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ABSTRACT

This document is a compendium of Colorado special education administrative decisions issued in 1996 and 1997, including decisions of impartial hearing officers (IHOs), state level reviews, and federal complaints officers. An index is provided which lists the decisions by key topics. The full text of each decision is preceded by a case summary that includes a listing of key topics, a statement of the issues, and the decision. Decisions are presented in approximately chronological order, and different color tabs identify decisions of due process hearings, state level reviews, and federal complaints. The issues addressed by the decisions include the following: compensatory services, confidentiality, eligibility, evaluation, extended school year, extra curricular activities, free appropriate public education, home-based education/home-schooling, individual education plan (IEP) development and implementation, jurisdiction of the IHO decision, least restrictive environment, manifestation determination, modifications/accommodations, paraprofessional support, related services, safe environment, school of choice, Section 504, special education referral, statute of limitations, stay-put provision, suspension/expulsion, transition, and transportation. (DB)

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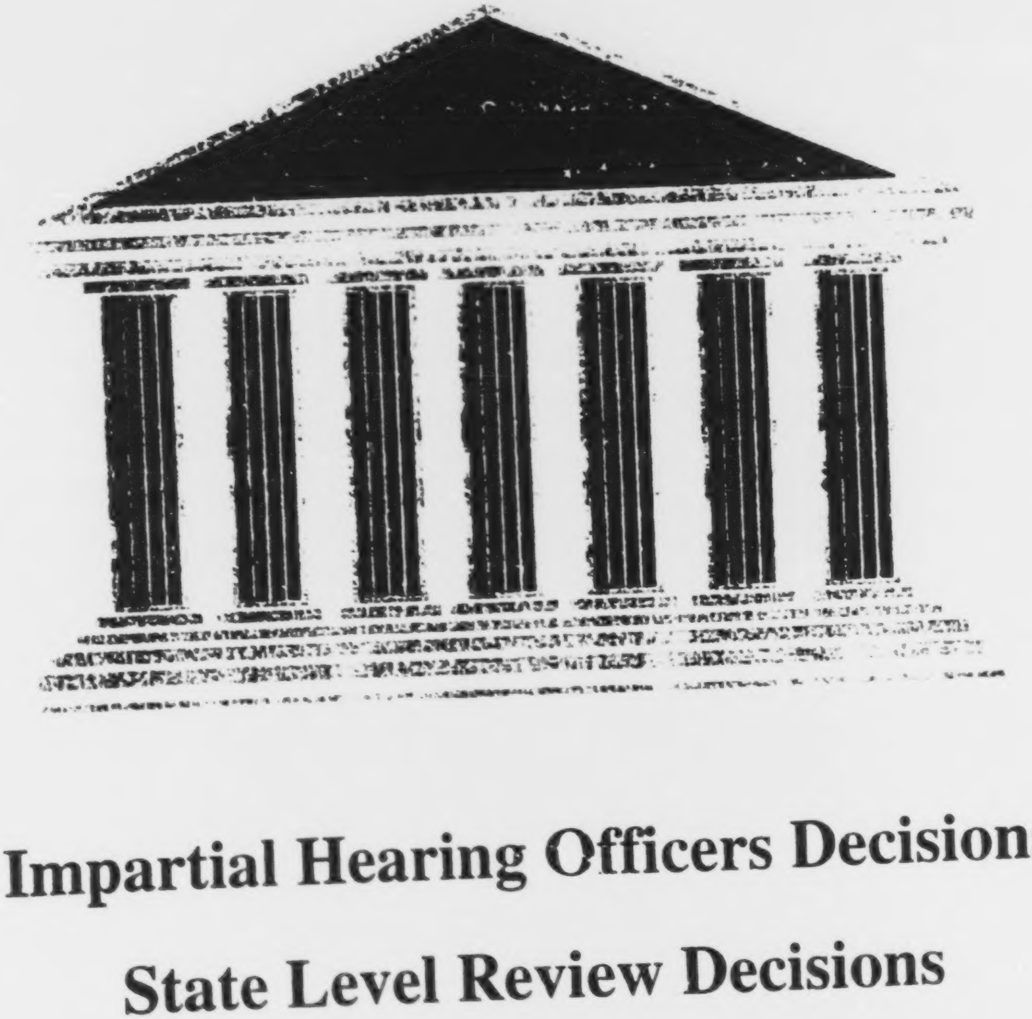

Impartial Hearing Officers Decisions

State Level Review Decisions

Federal Complaints Officer Decisions

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COLORADO SPECIAL EDUCATION ADMINISTRATIVE DECISIONS

1996 - 1997

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Commissioner of Education (February 1988 - August 1997)
State of Colorado

William J. Moloney
Commissioner of Education (September 1997 to Present)
State of Colorado

Myron Swize
Interim Director
Special Education Services Unit

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1996-97 Colorado Special Education Administrative Decisions

Introduction

Purpose
This binder of the Colorado Special Education Administrative Decisions contains all Impartial Hearing Officer Decisions, State Level Review Decisions, and Federal Complaints Officer Decisions issued in 1996 and 1997. This binder is a resource tool for Special Education Directors, Impartial Hearing Officers, Advocates, Attorneys, and others involved in assuring the provision of a free appropriate public education to children with disabilities in Colorado. Materials will be updated on a periodic basis by the Special Education Services Unit of the Colorado Department of Education.

Summaries and Index
The full text of each decision is preceded by a case summary which includes a listing of key topics, a statement of the issues, and the decision. Additionally, an index is provided which lists the decisions by key topics.

Tab and Case Number Layout
The decisions are presented in numerical order (based on the date a request for due process, or filing of a federal complaint, is received within the Department).

Due Process Hearings
Impartial Hearing Officer decisions are all preceded with a red tab and designated with a case number beginning with "L", followed by the year of request and a number starting with "101" that designates the chronological order in which the request was received by the Colorado Department of Education within a particular year, for example "L96:101". However, there may not be an Impartial Hearing Officer decision in this binder for every case filed with the Department (i.e., if the parties reached an agreement or the case was dismissed and a decision was not issued).

State Level Review
State Level Review decisions are all preceded with a blue tab. These decisions are appellate decisions rendered by an Administrative Law Judge in cases where a party filed an appeal on an Impartial Hearing Officer's decision. Therefore, State Level Review decisions contain the same number as the original due process case that preceded it, but they are designated with an "S" prior to the case number, for example "S96:101". Impartial Hearing Officer Decisions, State Level Review Decisions and any supplementary decisions on the same case are file together.

Federal Complaints
Federal Complaints Officer decisions are all preceded with gray tabs and designated with a case number that begins with the year in which it was filed with the Department and the a chronological number beginning with "501", for example "96:501". There may not be a decision for every federal complaint filed with the Department (i.e., if the parties reached an agreement).

It is intended that the materials contained in these volumes be used for information and guidance by those involved in the provision and administration of special education programs. The materials do not necessarily reflect the current administrative positions of the Colorado Department of Education.

The cover sheet preceding this Introduction reflects the Commissioner, the State Special Education Director, the Federal Complaints Officer, and State Board Members present in 1996 and 1997.

Special Education Administrative Decisions
1996-97

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Issue	Due Process		State Level Review		Federal Complaint	
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Issue	Due Process		State Level Review		Federal Complaint	
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Case No.: **L95:112**

Status: Impartial Hearing Officer Decision

Key Topics:
Free Appropriate Public Education (FAPE)
Unilateral Placement
Due Process Rights
Individual Education Plan (IEP)
Extended School Year (ESY)

Issues:

- Whether or not the district provided the child a FAPE.
- Should the district reimburse the parents for tuition for unilateral placement?
- Did the district fail to properly advise the parents of their due process rights?
- Did the district fail to properly prepare the child's IEP?
- Did the district evaluate the child for ESY services?

Decision:

- The district has failed to provide her with a FAPE pursuant to IDEA.
- Denver Academy was an appropriate placement for the student.
- Failure of district to provide FAPE entitles parents to some reimbursement for Denver Academy tuition.
- The district failed to properly advise parents of their due process rights each time the district was required by IDEA to provide said rights to parents.
- The district failed to properly prepare the student's IEPs in that no measurable short and long term goals and objectives were provided.
- The district failed to evaluate the student for ESY services.

Discussion:

- Parents not entitled to 100% reimbursement because services at Denver Academy exceeds services district was required to provide.
- Retroactive reimbursement is entitled to the parents for all summer tutoring programs.
- IHO orders.

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO

JAN 16 1997

Case No. L95: 112

DECISION

L.M., by J. and D.M., parents

vs.

ST. VRAIN VALLEY SCHOOL DISTRICT RE-1J,
Respondent.

This case commenced with a request for a due process hearing filed on June 5, 1995, by J.M. and D.M., parents of and on behalf of their daughter, L.M., a school aged child.

The child will be referred to herein as "L" or as "child;" the parents will be referred to herein as "parents," "Mother," or "Father;" and St. Vrain Valley School District RE-1J will be referred to herein as the "district."

The parents were represented by William R. Baesman, Esq. The district was represented by Susan Schermerhorn, Esq.

In their appeal, the parents alleged that the district had failed to provide L with a free appropriate public education (hereinafter "FAPE"), in that the district allegedly failed to provide appropriate assessment of needs, appropriate IEPs, proper advisement of due process rights, and an appropriate educational program. At closing argument, the appeal was amended to add a claim of alleged failure of the district to properly consider providing extended school year services.

Prior to their request for the hearing, the parents had unilaterally withdrawn L from public school and had placed her unilaterally in Denver Academy, a private school for disabled students which is not accredited by the Colorado Department of Education. The child was attending Denver Academy throughout these proceedings. When L had attended the district's schools, the parents at their expense had supplemented her education with private tutors and services from Slyvan Learning Center, a private school.

Generally, the relief requested by parents is a determination that the district failed to provide L with a FAPE since L first enrolled as a student with the district, and reimbursement for all educational services paid for by the parents. They also requested prospective relief in the form of the district paying the future cost of Denver Academy until L graduates from high school.

Start of the hearing was delayed a number of times. It actually commenced on May 20, 1996 and thereafter was recessed and reconvened a number of times. Testimony was presented from more than two dozen witnesses over fifteen hearing days. The last hearing day was November 6, 1996. The parents offered approximately 84 exhibits, all but a few of which were admitted into evidence. The district offered approximately 49 exhibits, many of which duplicated those of the parents, and all but a few of which were admitted into evidence. The exhibits consist of hundreds of pages of documents. During the pendency of the case, I issued more than a dozen written procedural orders.

Based upon the evidence, I make the following FINDINGS OF FACT:

1. L is a female child with a stated date of birth of 2-15-81.

2. L was adopted in June of 1987 directly from Korea, together with two male siblings.

3. An accurate or extensive family history is not available for L. I find that L's biological parents were extremely poor. Her biological mother abandoned her at an early age, probably due to a divorce. In Korea, it is customary that children are placed in the custody of the father's family after a divorce and apparently that occurred with L and her siblings. Apparently, the paternal grandfather made an attempt to care for the children for a short period of time and then placed them in an orphanage, from which they were eventually adopted by the parents. L's biological father was an alcoholic who may have been abusive toward the biological mother. He died about 6 months prior to the adoption, with his death being apparently related to his alcoholism.

4. Korean birth records are not known to be reliable in the circumstances noted above, and those regarding L's birth are no exception. Although L has a stated birth date of 2-15-81, I specifically find same to be inaccurate. Instead, I find from the evidence as to L's physical size, emotional immaturity, social interactions, elementary school difficulties, and delayed onset of puberty that she is at least one and perhaps as much as two years younger. The parties incorrectly relied upon 1981 as L's birth year, and this has caused many of her subsequent problems.

5. As a female child in Korea, especially one from a poor family, it would have been uncommon for L to have been offered much, if any, formal schooling in Korea. I find that L did not have any formal schooling there. When L arrived in the United

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States, she was illiterate in both Korean and English. She was also unable to speak any English and had a very limited ability to speak Korean fluently.

6. L had been enrolled in the district since the 1987-88 school year, which was her first schooling in the United States, until she was unilaterally withdrawn by her parents and placed at Denver Academy at the start of the 1994-95 school year.

7. L's primary educational disability is dyslexia, a specific learning disability. She has great trouble learning to read. The parties generally agree that this is at least one of L's educational disabilities. I find this educational disability to be of such severity that it substantially interfered with L's opportunity to make meaningful educational progress absent the provision of special education and related services. It qualifies her to receive special education and related services under IDEA.

8. A. Parents contend and the district denies that L also has the following educational disabilities which qualify her for special education and related services under IDEA: emotional problems, including anxiety, depression, and/or post traumatic stress syndrome (hereinafter grouped for discussion and referred to as "emotional problems"); central auditory processing deficiency (hereinafter referred to as CAPD); and attention deficit hyperactivity disorder of the inattentive type (hereinafter referred to as ADHD). The evidence regarding the existence or absence of these other disabilities is sharply disputed.

B. I find that L did have emotional problems and did display some signs and symptoms of central auditory processing difficulty and ADHD. However, as discussed in some detail below, I resolve most of this dispute in favor of the district.

9. A. I find that to the extent that L's emotional problems seriously affected her schooling, same was sufficiently remediated during L's early years with the district. This improvement was due both to the special education services provided and to L's own maturity over time. I find that for at least the past several years, standing alone or in combination with her other problems, the emotional problems did not pose such a serious educational disability that L was entitled to receive special education and related services for them under IDEA.

B. I find credible and accurate the testimony of L's teachers that although L did have some emotional problems at school, she basically looked, functioned, and acted as a student who, if not reasonably happy and adjusted, at least was not so emotionally maladjusted at school as to raise any substantial concern. I find the district's teaching team, including but not limited to the special educators, to be professionals who knew L well from their daily contact and involvement with her at school. I find no reason to suspect their general recall of the facts. I also find no evidence of any bias, prejudice, interest, or other reason for the teaching team members to color their testimony. I recognize not only my legal duty to give substantial weight and deference to the teaching team absent any unusual circumstances, none of which I find here, but also the wisdom of doing so here. Overall, I find the district's teachers to be well qualified professionals who brought a caring, skilled and professional approach to their duty to educate L.

C. I also find credible the testimony of Mother and of Drs. Gaebler, Dorry and Howell that L did suffer at various times from depression, poor self esteem, poor social skills, and post traumatic stress syndrome. However, I find that at least by the time L was finishing elementary school and attending middle school, most of these emotional problems were serious only, or at least primarily, when L was at home, and that they were related primarily to events in the home. I recognize that adopting L and her siblings would be an exhausting task for any family. It certainly was for these parents. I find, without any intent of implying any fault and recognizing that I have the luxury of certain hindsight, that L's emotional problems were primarily exacerbated by her relationship with her parents and siblings, rather than by school.

Father was described as strict to the point of harshness, and as lacking in the skills, temper, and temperament needed to deal well with L's emotional problems. I doubt that he fully recognizes these traits or that he realizes that L has emotional problems related to same.

Mother is clearly loving and has made Herculean efforts to help L. However, I also find that Mother was somewhat overwhelmed by and with L, unaccepting at times of L's limitations, and non-accommodating at times of same. A major example, as discussed elsewhere in this Decision, is Mother insisting, first over the recommendations of the school and later also over those of Dr. Gaebler, that L be advanced in grade despite L's rather obvious failure to master the material of her current grade. Another example is Mother basically doing the majority of L's homework, also discussed in some detail below, which I find detrimental to both remediation of L's educational disability and to L's educational progress.

I am also concerned about the physical setting for L at home for her homework. Frequently, if not always, L was doing her homework in or near the kitchen. The kitchen area frequently was far too chaotic to be an appropriate study area for any child and clearly contra to the very basic need of every child for a quiet study area. I find this poor physical location exacerbated L's emotional problems regarding homework and I also find exacerbated whatever CAPD and ADHD problems L had.

Mother imposed on L what she felt to be appropriate forms of discipline, based in some degree upon suggestions from Dr. Gaebler. However, I find Dr. Sadler's testimony persuasive that this form of discipline used humiliation in a fashion inappropriate for L's emotional problems. L then incorrectly connected this humiliation to school rather than seeing it as a Mother-child conflict.

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Last, but certainly not least, is the 8/94 knife incident. Mother had found L in the kitchen holding a kitchen knife in a manner which Mother interpreted to be a suicide gesture, shortly after a stressful discussion with L regarding school. Mother viewed this as L emphasizing her fear of school. However, Dr. Gaebler and Dr. Sadler determined the knife incident not to be a school issue at all, but more of a response by L to stress at home. I find their opinions to be accurate.

D. L did continue to have emotional problems at least up to and perhaps after her withdrawal from the district in 9/94. However, I find that by at least about the time L was completing elementary school, almost two different children were involved insofar as the emotional problems were concerned. One child was the "school L" and the other was the "home L".

The existence of these "two children" explains the great difference between the testimony of the parents' witnesses and the district's witnesses regarding the emotional problems. As I generally find the testimony of both groups credible, it also allows reconciliation of same.

I first had a serious suspicion that "two children" were involved when thinking about the conflicting testimony regarding the "Park It Project." This was a two year, group project that culminated in a presentation to the class. The teachers involved generally saw L as enjoying the project or, at least, not hating it. Mother, however, observed L struggling emotionally at home with this project and said it caused L tremendous distress. I watched a video of the presentation (Hearing Officer's Exhibit) and saw L as being understandably relieved once it was over, but also that she participated well, was smiling, appeared to enjoy herself, and that her classmates expressed pleasure with the presentation. Dr. Sadler verified my suspicion of the "two children" in his testimony, which I find both accurate and persuasive. Since at least about late fourth or early fifth grade, the "school L" did not have serious emotional problems which would have qualified her for special education services.

10. A. I find that to the extent, if any, L suffers from CAPD and ADHD, these were not so severe that standing alone or in combination with each other and/or L's reading disability that they constituted such a serious educational disability that L was entitled to receive special education and related services for them under IDEA. L's medication helped to remediate such problems.

B. In determining the existence or lack thereof of a serious CAPD problem, I have weighed the conflicting testimony of Dr. Burleigh and Dr. Muller. Dr. Burleigh found the existence of CAPD and recommended a remediation program. Dr. Muller did not. I find Dr. Muller more persuasive.

Dr. Muller testified that, with one possible expectation, Dr. Burleigh's test results show that L does not have CAPD. Dr. Muller was very critical of the tests used by Dr. Burleigh. One test relied upon by Dr. Burleigh is no longer widely accepted due to its age and questions as to reliability. Certain other tests Dr.

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Burleigh used are primarily geared toward adults. Dr. Muller testified that one test administered by Dr. Burleigh which Dr. Burleigh felt showed the existence of CAPD (the ipsilateral/contralateral) was apparently developed by Dr. Burleigh. To the best of Dr. Muller's knowledge, which I find is very extensive, that test has not yet been recognized as being valid. Dr. Muller also testified that there are tests for CAPD in children that are more reliable than those used by Dr. Burleigh.

For whatever reason, parents chose not to offer any rebuttal to Dr. Muller's testimony. I find that parents have not met their burden of proof to establish that L has CAPD, at least not to the degree that it is a serious educational disability.

C. In determining the existence or lack thereof of a serious ADHD, I have weighed conflicting testimony primarily from Drs. Gaebler, Dorry and Howell on the one hand, with that of Dr. Waters on the other hand. Of course, I have also considered the testimony of all the classroom teachers and school personnel. I also reviewed the diagnostic criteria for ADHD in the Diagnostic And Statistical Manual Of Mental Disorders (DSM-IV), relied upon by some of these witnesses.

I find Dr. Waters more knowledgeable regarding ADHD than are Drs. Gaebler, Dorry and Howell. I also find Dr. Waters' opinion on the question of the presence or absence of ADHD more persuasive than those of the other witnesses. Therefore, I find that the parents have not met their burden of proof to establish that L has ADHD, at least not to the degree that it is a serious educational disability.

D. I also find that the special education and related services provided by the district did help remediate those signs and symptoms of L that indicate she might have had some CAPD and some problems with ADHD, at least to the degree same were an educational disability.

11. The parents contend that the district failed to consider L's need for extended school year (ESY) services. I resolve this issue in favor of the parents. I find little, if any, evidence that the district ever seriously evaluated L for ESY services. Dr. Sires, the district's special education director, agreed on cross examination that there is no documentation that the district's own ESY policies were followed. I find they were not followed. Exhibit 28, ESY-1, fails to persuade me that ESY services were seriously considered. To the contrary, that exhibit helps me determine that no serious consideration was given to ESY services. No baseline was determined at the close of one school year and none was established at the start of the next, to ascertain whether L regressed over the vacation to the degree that ESY services would be appropriate.

And, to the extent ESY was considered, the evidence suggests that at least some of L's teachers saw a need for ESY services. For example, summer school services were specifically recommenced in 1989 (Ex. 3). The staffing teams were well aware that L was reading well below grade level even though she had tutoring each summer. At the suggestion of the Hygiene Elementary School principal, L attended at parents' expense a district summer school reading program the summer of 1990.

12. A. The parties seriously dispute what evidence I should rely upon in determining whether L made meaningful educational progress while a district student.

B. While I do not rely entirely upon one type of evidence in making this determination, I do rely primarily upon the results of L's standardized educational testing through 1993, as summarized on Ex. 58. I find same to be the best indication of educational progress or lack thereof. One purpose of standardized testing is to determine growth or lack thereof from one point in time to another. The district relies heavily upon these tests to evaluate all students. I find such reliance to be both reasonable and usual. Standardized testing was done each year, about January. The same tests were used through 1993, at which time they changed. I find L's test results to be generally free from outside influences, other than those concerns as expressed below.

C. Parents urge me to find that L's performance on standardized tests shows she is progressing below her potential. In this regard, parents allege and I find from L's IQ testing, that L is of at least average intelligence. Parents then urge me to find that as a child of average intelligence, L "should be" achieving grade level performance on standardized tests, and that her standardized test scores "should" show progress of at least one grade level from year to year. Such growth is indicated by the "grade level" line on Exhibit 58, and L's performance is below that line.

I simply cannot make such findings based on this record. The record is devoid of any evidence that all or most children of L's intelligence achieve grade level performance on standardized tests. Nor can I make these findings based on general knowledge. To the contrary, almost every day reports appear in the news that a substantial percentage of children at this school or that school are testing well below grade level.

D. Parents also urge me to find from L's standardized test scores that L is not progressing in a meaningful fashion as compared to her peers. I find L's peers to be female children of average intelligence who were adopted at or near age 4-5 from a country in which female children are culturally denied education; who were denied any educational opportunities in their country of origin; and who came to the United States functionally illiterate in both their own language and in English and with minimal oral language skills in both their own language and in English. I find no evidence in the record as to the educational progress of L's peers and thus have no evidence from which to make any comparison.

E. Parents urge me to compare testing done at Denver Academy with that done by the district as a measure of educational progress or lack thereof. I find from undisputed evidence that different tests were used. I also find that one

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cannot make a direct comparison between the results of one test and the results of another test; when this is attempted, one is comparing apples to oranges. I find the record substantially devoid of any meaningful method of converting the scores on one test to those of another.

F. Parents urge me to use the district's internal "discrepancy formula," discussed below, as a measure of lack of meaningful progress. As discussed in some detail below, that formula was first used by the district in the fall of 1990 to determine which children were disabled to the degree they were eligible for special education services. According to that formula, L was not eligible for special education and related services because she was not doing "badly enough." At least as applied to L, the discrepancy formula is not a reliable indicator of whether or not a need for special education services exists. I find that L was clearly entitled to such services regarding her reading disability when the formula was first applied to her. The district ignored the discrepancy formula result and provided L with such services. It was wise to have done so.

I also find that Ex. 83 has little or no probative value on the issue of whether L has made meaningful educational progress. It is based on the district's discrepancy formula, which I find is not a reliable indicator. I also find the exhibit confusing and an attempt to use the discrepancy formula in a manner not contemplated when the formula was adopted by the district.

G. Parents urge me to rely upon Ex. 57 as evidence that L has regressed. Ex. 57 is a comparison of L's CTBS scores in third and fifth grade. The CTBS is a different test from the standardized tests whose results are summarized on Ex. 58. Dr. Dorry, parents' own witness, expressed concerns that due to L's reading disability and certain environmental factors, the CTBS is a problem for L. Over the years, the standardized testing summarized in Ex. 58 was done more frequently than the CTBS. For these reasons, I give little or no weight to Ex. 57 and defer instead to the standardized test scores summarized in Ex. 58.

H. The district urges me to find that L's report (grade) cards show educational progress. However, I find L's report cards to be of little probative value regarding this issue. A meaningful part of her grades depended upon L's homework, especially once she reached middle school. I find from basically undisputed facts that L could not do her own homework but instead her homework was substantially done by her mother. I find Mother earned reasonable grades, but that the grades awarded L, to the degree they were based on homework, are not evidence of L's own educational progress. L's grades were also based on class work and tests. Some of these grades were based on modifications due to L's disability. I find the evidence confusing at best as to which, if any, of the class work and tests were based upon modifications to accommodate L's educational disabilities and specifically find little or no consistency regarding such modifications. Thus, I cannot determine with reasonable certainty and reliability whether a certain grade on a test or class exercise was or was not modified

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and how to compare same to a grade entered a week or a month later.

I. The district urges me to find that L's IEPs show meaningful educational progress towards most of her goals. Parents urge me not to use the IEPs as a measure of growth. This is because parents allege that most of the IEP goals are meaningless as a measure of progress in that they fail to contain measurable criteria, thus making impossible the measure of any growth. I find that parents are basically correct.

For the most part, the written IEP statements of goals and objectives are not quantified such that I can ascertain with a reasonable degree of specificity or certainty the baseline or the measurable criteria to show progress. Thus, I cannot determine from the IEPs what progress actually occurred.

13. L's IEPs are "signed off" on by Mother. I raised as a question at the hearing what effect, if any, that should have upon my decision, as parents seek monetary relief going back to the time L first started with the district, i.e. whether Mother's signature precludes her from obtaining such retroactive relief. I find it does not so preclude such relief.

The parental signature sections of the IEP forms are deficient and misleading. They do not state that the parent's signature means the parent agrees with the proposed program. Mother testified, and I so find, that she felt she "had no choice" but to sign the IEPs. I also find Mother's signature not a bar to retroactive relief because, as noted below, I find the IEPs seriously deficient regarding the district's duty to inform Mother of her due process rights.

14. Parents contend that the district failed to discharge its duty to properly inform them of their IDEA due process rights. I agree. Even the most casual review of the forms used by the district show they do not even come close to the required advisements.

15. L first started school in school year 1987-88, in a kindergarten/first grade regular class at Hygiene Elementary. L was not then identified as a disabled student. Instead, L received services through the district's English As A Second Language Program. She was first identified as a disabled student 2/89, when she was in the second grade.

16. Parents had concerns throughout L's first school year, primarily with what they correctly perceived to be L's great deal of difficulty with learning how to read English. Another expressed concern was with perceived inconsistencies in memory, such as being able to remember the alphabet at times but not at other times, and being able to recall her telephone number some days but not others.

17. Parents enriched L's academic opportunities beyond

school. They hired a tutor for the summer of 1988, with the emphasis on learning the alphabet and with the hope that L might start reading. By the end of the summer, L still could not consistently recognize all the letters of the alphabet and had made little or no progress with reading. In late 1988, parents enrolled L at Sylvan Learning Center, in the hope she would develop reading skills. This, too, was basically unsuccessful. L also attended Sylvan the summer of 1989. Parents paid for the tutors and for Sylvan, and seek reimbursement from the district for same. Prior to commencement of this case, parents had not requested reimbursement for the expenses of the tutors or Sylvan; they do request such reimbursement as part of the relief requested herein.

18. A. L's first grade teacher recommended that L be retained in first grade for the 1988-89 school year due to L's substantial failure to master first grade material. That recommendation was rejected by the parents, based in part on the opinion of the agency which had arranged L's adoption. A major concern was the adverse effect parents believed such retention might have had on L, especially because L would then be in the same grade as her "younger" brother.

B. Considering my finding above as to L's most likely age and also L's subsequent difficulties, I find that following the retention suggestion certainly would have been in L's best interest and likely would have limited if not eliminated many of L's subsequent problems. I realize I have the benefit of substantial hindsight not then available to parents. I make this finding not to disparage parents' choice, but in recognition that the recommendations of professional teachers are not to be lightly disregarded. A professional teacher's observations, instincts and feelings are based upon training and experience. I find that L's teachers had sufficient training, experience, and expertise for their recommendations to outweigh the well meaning suggestions of the unqualified persons upon whom parents did erroneously rely in making this crucial decision.

19. Starting about 9/88 and continuing through the hearing dates, L and her entire family received family therapy by Francis Gaebler, a licensed clinical psychologist. He saw L as regressed, depressed, a slow learner, and the most withdrawn of the family group. However, L's problems were not so severe for him to see a need for any major treatment, and he gave her no specific diagnosis. Dr. Gaebler observed L at Hygiene Elementary in 10/88 and recommended a psychological evaluation, continuation of tutoring, the need to work on L's crying in school, and that consideration be given to retaining her in grade. On a subsequent visit, he recommended that L be evaluated at the Asian\Pacific Center For Human Development.

20. A. The Asian/Pacific Center For Human Development was known to have substantial experience in evaluating Korean and similar foreign adoptees. The district referred L there for

testing at the district's expense. The testing was done 12/88-1/89, at which time, L had been in the United States about 1.5 years. At that time, L was unable to speak or write Korean to the degree that she could be tested in that language. By then, she had developed some English skills and the testing was done primarily in English. There was a testing notation that due to her lack of both Korean and English written and oral language skills, L presented a "difficult testing dilemma." The tests used were not normed for Korean cultures, but the Center felt administering L an intelligence test based on Korean culture would be invalid.

L's full scale IQ was 91, which is in the average range of intellectual capacity. Subsequent IQ testing over the years also resulted in L testing in the average range. I find that she is of at least average intellectual capacity.

B. The Asian/Pacific Center also determined that L had the ability to give good attention to detail, had at least average ability to concentrate, and had an attention span well within normal ranges. Although L's verbal IQ score was somewhat suppressed, that was believed to be due to her cultural background and lack of familiarity with English and with western culture, and I find such belief to be accurate.

C. The testing determined that L had widely fluctuating emotional ranges, changing from being secure to being very frightened. These were seen as suggestive of Post-Traumatic Stress Disorder. Given L's background and the evidence of subsequent events in her life and behavior, I find same accurate.

D. The Asian/Pacific Center made no firm recommendations. It suggested that it "may be helpful" for L to get "some remedial direction" in some educational areas and that "certainly and [sic] further educational tests may point to more specific ways that the school could help her." The Center added that "[h]owever, the most benefits would come from paying attention to the emotional areas in her life."

21. A. A special education assessment and a staffing was done by the district in 2/89. L was identified as having academic difficulties in the following areas: reading; math; spelling; auditory memory retention; and behavior, including difficulty with routine changes, low tolerance level, some clinging, and difficulties with socialization but always willing to participate, and low self esteem. Formal testing results were noted to be of questionable accuracy as a language insufficiency and/or cultural bias could be interfering with an accurate assessment. Auditory processing skills were considered to be generally adequate, but at times it appeared that L was not listening, although that could be related to her limited language skills. Expressive language skills were limited, and L's social communication skills were "iffy." It was noted that L had some emotional factors/overlay that interfered with learning.

B. As a result of all the in-school testing plus the Asian/Pacific Center's evaluation, L was identified as a disabled student and eligible for special education services on 2-

14-89. An IEP was written (Exhibit J). L's primary handicapping condition was identified as "EBD" (emotional behavioral disorder), with a severity of "mild" on a scale of mild, moderate, severe, or profound. The existence of a specific learning disability was specifically rejected.

C. The special education services recommended were up to 5 hours per week of itinerant special education services to be provided at Hygiene Elementary School.

22. I find that the evaluations conducted by the district 12/88-2/89 constituted an adequate special education assessment at that time. Formal testing was done to the extent possible, given L's limitations in spoken and written language. Use of the Asian/Pacific Center to assist with assessment was appropriate. Impute of the classroom teacher was considered, as were the comments of Dr. Gaebler and of L's mother. Classifying L at that time as "disabled" and entitled to special education services was a good faith effort by the district to somewhat bend the rules so that extra help could be provided to L. L's academic deficiencies at that time were correctly perceived to be caused primarily by her ethnic background, rather than by any identifiable disability.

23. After three months of special education services, L had shown some academic progress (Exhibit 21). I find those services were calculated to allow her to make some meaningful educational progress and that she did, in fact, make some meaningful educational progress between 2/89 and 5/89. As used by me here and elsewhere in this Decision, I use the term "meaningful" to mean that for L, the educational progress or benefit was more than trivial but not necessarily up to her maximum potential.

24. I also find meaningful academic progress was made by L between 2/89 (second half of second grade) and 2/90 (second half of third grade), as noted in the comparison of standardized testing scores in Ex. 22, IEP-6.

25. A. However, it is clear that L had failed to master much of the second grade material in the 1988-89 school year. For these and other reasons, Dr. Gaebler recommended at the end of second grade that L be retained in second grade for the 1989-90 school year, rather than moved ahead into third grade. I find this recommendation for retention was in L's best interest.

B. However, parents again rejected retention and L was thus pushed ahead into the third grade for the 1989-90 school year even though, as Mother testified, L could not read and did not have third grade skills. Mother testified that parents made this choice substantially due to L's "insistence" she move ahead. For at least two reasons, I find this choice detrimental and a major contributing factor to L's later school problems.

(i). By this time, one of parents' expressed social/emotional problems regarding L had been

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exacerbating. Due to L being noticeably physically smaller than her classmates, her "cuteness" from her Korean ethnicity, and due to L's tendency toward crying inappropriately in class, L's classmates had more or less adopted her as the "class baby." Classmates treated L as being much younger than L's "official" age, doing things for her as they might do for a much younger sibling. All of this adversely affected L's self esteem and self confidence and, in the words of Dr. Gaebler, L began acting the role of "class baby." Allowing L to be retained in second grade would have offered her the advantage of being with children more like herself, rather than different from her in physical size, emotionally and academically.

(ii). When third grade was to start, L had not mastered even all of first grade work. As of 2/90, when L was half way through third grade, her reading, written language, auditory memory, and spelling skills were below second grade level, her visual perception skills were at beginning second grade level, and her math skills were only at second grade, fourth month (Ex. 22, IEP-6).

26. A. By 11/89, L's third grade teacher had reported to parents that L clearly did not belong in third grade, as she was barely reading on the first grade level and could not keep up.

B. However, parents refused to consider moving her back to second grade. I find that parents made a clear and voluntary choice to keep L in third grade against the valid recommendation of her teacher, for the primary reason they thought that would keep L happy, knowing full well at the same time that L could not do third grade work.

C. I find no evidence that additional special education services would have been helpful. Instead, L simply lacked the academic skills to be in third grade for the 1989-90 school year and just did not belong in third grade.

27. The inappropriateness of parents pushing L into third grade is evident in the 2/90 IEP. Although L was then half way through third grade, the annual academic goals for the year ending 2/91, when L would be half way through fourth grade, are noted as being that L would be able to do second grade work (Ex. 22, IEP 4).

28. A. Both Mother and Dr. Gaebler testified that they felt that Dr. Gaebler had made a recommendation at the 2/90 staffing that L should be evaluated for a possible attention deficient disorder and for a possible auditory processing problem.

B. No such recommendation appears in Ex. 22. None of the district members of that staffing team who testified recalled any such recommendation. No such evaluations were conducted, at least not prior to the institution of this case. Parents assert that the district's refusal to conduct such evaluations denied L a FAPE.

C. I find it more likely than not that Dr. Gaebler did say something at that staffing about a possible concern with attention deficient disorder and auditory processing, and that he felt this to be a "recommendation" for an assessment. However, having observed Dr. Gaebler carefully during his testimony, I also find that whatever Dr. Gaebler said was said in such a fashion that at best his words were presented to and received by the staffing committee more as a passing comment than as a serious recommendation, suggestion, request, or demand. I find that such words were never considered by the staffing team as a serious recommendation, suggestion, request, or demand for such evaluations.

D. I find no fault with the district in this regard. If any fault exists, I find such fault lies with Dr. Gaebler's failure to express himself such that the staffing team reasonably knew or should have known that he was making a serious recommendation, suggestion, request or demand for such evaluations.

29. At the end of L's third grade year, L's school principal recommended that L attend a district summer reading program during the summer of 1990. L attended that program and received a passing grade (Ex. 24). Parents paid a fee in an unknown amount for this course. It is not clear whether parents specifically seek reimbursement from the district for same.

30. In June, 1990, at the end of L's third grade year, another recommendation for retention was made by the district. Finally, parents agreed. L was retained in the third grade for the 1990-91 school year.

31. A. Parents' fears about L's reaction to being retained did not materialize. Instead, L had a reasonably successful repeat of third grade for the 1990-91 school year, in that she grew academically and emotionally. L returned to Sylvan Learning Center for tutoring that academic year. At the 2/91 staffing, L's academic skills as tested on a standard battery showed the following:

	1990	1991
Reading	1.6	2.1
Math	2.4	3.3
Written Lang.	1.7	2.5

B. The staffing notes also report that L was able to work much more independently and could participate more in class activities. The staffing report also noted that L had met her 2/90 goals. (Ex. 25, IEP-6;AR-1).

C. While I find the staffing report to be somewhat self-laudatory in that L had made less than a full grade of progress on any test in the one year, I find that the above shows that L made meaningful educational progress between 2/90 and 2/91.

D. I also find, as did the staffing team, that L

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was still substantially below grade level. In 2/91, L was half way through third grade and grade level scores "should" have been about 3.6.

E. In the fall of 1990, the district adopted a "discrepancy criteria," which purported to identify students who had a perceptual or communicative disorder (PCD) and thus were eligible for special education services. This criteria was first applied to L at her 2/91 staffing. The criteria used a mathematical formula in an attempt to identify the existence of any "discrepancy" between a student's potential ability as measured by the student's IQ and the student's scores on standardized tests, and to determine the significance of same. Included in the formula is the student's IQ, number of years in school, and actual achievement. Then, an arbitrary "discrepancy criteria" factor, here .6, was applied to determine the existence of a perceptual communicative disorder (PCD) serious enough that the student would be eligible for special education services.

Per these calculations, L's potential in reading comprehension, written language expression and math was calculated to be at the 3.2 grade level. Her discrepancy criterion was the 2.1 grade level. Any scores for L below 2.1 purportedly would show a significant discrepancy between L's achievement and ability. L's 1991 scores showed no significant discrepancy between her expected and actual achievement (Ex. 25, IEP-7).

F. Per this discrepancy formula, L was not eligible for special education services as having a PCD. However, due to a change in the law, L's then existing special education classification of EBD had been deleted. The district had serious concern whether L could meet the qualifications of the "emotional disorders" criteria which more or less replaced the former EBD classification.

The district felt L needed to continue with special education services. It therefore once again stretched the law and went ahead and classified L's educational handicap in 2/91 as being (PCD) regardless of the discrepancy formula in order to continue serving her. I find this was done in good faith and was certainly done by the district to benefit L. Parents agreed to this change of identification of L's educational handicap.

32. L was tutored again during the summer of 1991, at parents' expense. Parents seek reimbursement from the district for this expense.

33. A. L was in the fourth grade for the 1991-92 school year. She also attended Sylvan Learning Center for tutoring. She had a triennial review in 2/92, preceded by more extensive formalized testing than for an annual review staffing. Psychological testing verified her average intellect. Formalized testing 2/92 (4th grade, 6th month) showed (ex. 28):

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	1991	1992
Reading:	2.1	
Letter word I.D.		3.8
Passage comp.		3.3
Word attack		3.5
Read. vocab.		3.1
Math	3.3	
Calculation		4.5
Applied problems		4.4
Written Lang.	2.5	
Dictation (spelling, punct., grammar, writing fluency)		3.1
Informal Reading Samples		
Instructional level		4th grade
Independent level		3rd grade

B. I find that although L was still below grade level 2/92 (grade level was 4.6), the above shows that she had made meaningful educational progress between 2/91 and 2/92. Her general academic IEP goals for the year ending 2/93 (when she would be in grade five, 6th month) were to achieve 4th grade levels where she now tested in third grade levels.

34. A. L's overall knowledge of science, social studies and humanities (literature, art, music) were tested as part of her 2/93 triennial review. She scored at the 2.3 grade level. This was noted as being a "marked" discrepancy, but was explained by the district as possibly being due to her pre-school years in Korea (ex. 28, "Triennial Education Evaluation").

B. I find no reasonable basis in the evidence for such an assumption. I find it more reasonably explained as a result of L's poor reading ability, which in turn affected her ability to learn what was being taught in science, social studies and humanities. If one cannot read the text, written materials, and research materials, and if the supplementary materials do not make up this deficiency, I fail to see how one can master the subject material.

C. Mother testified that given this test result, she began to doubt the validity of L's report card grades. For example, in Ex. 26, L "earned" grades of S (satisfactory) or S+ in "knowledge" areas in third grade, yet she tested at only the 2.3 grade level. As discussed above, I likewise find L's report cards as having little probative evidence of L's educational progress or lack thereof.

35. A speech-language evaluation was also part of the 2/92 triennial review. She was 4.5 years below level on receptive and expressive language skills with an overall language delay of

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2.5 years on another test. L had previously been disqualified for speech-language services based on her Korean background as an explanation for such delays. At the 2/93 staffing, it was determined that L should receive formal speech-language services, which services were then provided.

36. L was tutored in reading and math at parents' expense during the summer of 1992. Parents seek reimbursement by the district for this expense.

37. A. L attended fifth grade for the 1992-93 school year. At her 2/93 staffing, it was reported that she had achieved the following standardized test scores (Ex. 31):

	1992	1993
Reading:		
Letter word	3.8	4.7
Comprehension	3.3	4.2
Math:		
Calculation		5.1
Applied problems		4.9
Written language:		
Dictation	2.5	3.3
Written lang.	3.1	4.5
Knowledge	2.3	3.6
Informal Reading Sample		
Instructional level	4th grd.	5th grd.
Independent level	3rd.grd.	4th grd.
Reading vocab.		4.7

B. I find that L made meaningful educational progress between 2/92 and 2/93 in the above areas, although she was still approximately one year below grade level (5.6) in most areas, and two years below in "written language-dictation" and in "knowledge."

C. The speech and language pathologist reported, and I so find, that L had met 6 of her 8 goals. Those goals were reasonably specific and measurable. I find that L made meaningful educational progress between 2/92 and 2/93 in speech-language.

38. L received private tutoring the summer of 1993 from a teacher who had a special education background. Parents seek reimbursement from the district for this expense.

39. A. A major educational change occurred for the 1993-94 school year. L entered sixth grade. This required a move from Hygiene Elementary to Westview Middle School. L thus left the

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sheltered environment of the single teacher elementary school model for the multi-teacher, multi-class model of the middle school.

B. L was certainly not ready to move ahead to sixth grade; she was not even capable of doing end-of-fourth-grade work. Unfortunately for her, apparently the district did not suggest retention although I strongly suspect that had that suggestion been made, it would have been soundly and unwisely rejected by parents. I strongly suspect another year in elementary school would have been a tremendous help to L and would have avoided most of her subsequent problems.

C. It was at and following L's move to middle school that the district seriously failed to provide L with those special education and related services she required in order to receive a FAPE.

D. To help all children make the transition to middle school, Westview assigned each child to a teaching team. All students in a team had the same four teachers for the four middle school core subjects of English, Math, Science, and Social Studies throughout their middle school years. A major function of the teaching team was that the four teachers met each day to share insight regarding the children on their team. In this fashion, something noticed by the English teacher, for example, would be shared with the Science teacher so that all worked consistently with a given student.

E. I find that the team teaching approach did not significantly assist L with her educational disability. One concern I have is with the lack of consistency within the team regarding modification of L's school work. Due to her disability, some of L's school work was modified. For example, L might be assigned to doing only the odd or even number math problems while the rest of the class did the entire page. The goal was to reduce L's math homework. If modifications were done on a regular and consistent basis, they could have been of some help. However, I am not convinced that necessary or educationally helpful modifications were done on a regular and consistent basis to the degree that I can find same to be a program of specialized instruction geared towards L's specific needs. To the contrary, I find that the modifications were primarily done on a reactive rather than proactive basis. That is, when Mother complained enough, helpful steps would be taken, but not on such a consistent and integrated basis that I am able to find same were a real program for L.

F. A major problem with these modifications is that L's IEP was far to broad and general to give the teachers who were to implement the IEPs any firm direction as to determining the need for and implementing course modifications on a regular and consistent basis. . . .

G. L did receive some help at Westview from special education services in addition to her regular classroom teacher team. The theoretical help available and the actual help received were substantial strangers to each other. Primarily two forms of such help were available.

H. First, a special education teacher roamed the

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regular classrooms to provide on-the-spot help with classroom work, understanding assignments, and the like. I find provision of this help to be an important part of L's overall special education program.

This special education teacher was supposed to be available to help L and any other special education students in whatever class that might be in session. In practice, however, this teacher was also responsible for assisting every child in the class, including non-disabled children, as any of such children might seek help or as the regular classroom teacher might request. Thus, this special education teacher was to provide one-on-one or small group help to some thirty students, more or less, each class period.

The district's evidence fails to convince me that this service was readily available to L on a reliable, regular and consistent basis to the degree that it was of any reliable, regular and consistent help to her. To the contrary, I find the reality to be that such assistance was only available to L on substantially a "hit and miss" basis. As such, it was not a service to specially assist L. I also find that the classroom special education service was basically a "stock" service into which L was expected to "fit," rather than being one custom designed to meet L's own special needs.

Overall, this service was just not delivered so as to help L to the degree she needed help to obtain a meaningful opportunity to benefit from her education.

I. The second special education service was use of a special education resource room and teacher. Again, theory and practice were often only casual acquaintance.

Theoretically, L could be sent to or could go to that room on a scheduled or an as needed basis to receive help. That help might be just a quiet place to take a test beyond the time allowed other students, or it might be one-on-one help with a specially trained teacher to help L learn to read text books, or with an assignment.

A huge deficit in the "program," was the method used for L to access the potential services available through the resource room. The resource room was not a regularly scheduled and important "class" in L's daily school day. Instead, to get resource room help often required L to take action. This is particularly troublesome. "Someone" had to be in charge of determining L's use of the resource room. I find that basically the district just put L in charge. This was grossly inappropriate.

L has been consistently described as a somewhat shy and withdrawn child who disliked calling attention to herself in general, and intensely disliked calling attention to how she might be different from her classmates. L saw using the resource room as an activity which emphasized she was "different" from her non-disabled classmates. L at times resisted using the resource room. I find no evidence to convince me that L was of sufficient maturity of judgment to realize that she needed this help on a regular, consistent and educationally meaningful basis; in fact, I find the reverse is more accurate. I find no evidence that L had sufficient maturity to seek this help on a regular, consistent and educationally meaningful basis even when she did realize she needed same; in fact, the opposite was true. In short, just as I found Mother deferred inappropriately to L's "feelings" about retention in grade, I find the district inappropriately deferred to L's negative "feelings" about using the resource room. As a result, L did not get the regular, consistent and educationally meaningful help she needed from the resource room.

An equally serious problem was the resource room's lack of adequate resources to properly address L's educational disability. She was a sixth grade student reading below the end-of-fourth-grade level. Some sixth grade materials were available orally on tape and I find that same probably were of some help; however, this service was sporadic at best as most of the text and classroom materials were not available on tape. The district did not furnish L with materials at her reading level or otherwise regularly, consistently and in any way meaningfully provide her with some means of learning sixth grade materials with a fourth grade reading ability. This convinces me that L's special education program was not very "special" at all, but was more an unsuccessful attempt to shoehorn L into a "stock" program.

I find the help that should have been available to L from the resource room was an important part of her overall special education program. I find the help actually provided by the resource room to be more of a "hit and miss" service rather than the regular, consistent program required to assist L. The resource room should have been, but was not, a meaningful aid to help L learn the day's academic lessons from all of her classes.

J. Homework was a significant problem for L in elementary school. It became a giant problem for L in middle school. Homework included not only reading classroom materials, but also independent library work. I just totally fail to see how the district expected L, with at best a fourth grade reading level, to do sixth grade level independent research.

I find that at least by the end of L's sixth grade year, the district knew or certainly should have known that L was educationally incapable of doing a substantial part of her own work because she simply could not read the material.

K. I find no evidence that persuades me that L was given the opportunity to make, or made, meaningful educational progress once she reached middle school. To the contrary, the evidence tends to indicate that, if anything, she regressed.

L. Overall, I find the special education assistance provided to L once she reached middle school was not sufficiently designed or implemented to meet her specific needs, especially as related to L's reading disability. That assistance failed to offer L a meaningful opportunity to benefit from school. Given the combination of L's educational disabilities and the district's lack of actual provision of special education services to adequately deal with those disabilities, L just did not belong in middle school in 1993-94. The district allowed her to be "promoted" to sixth grade, and then failed to serve her needs once she arrived.

40. Parents unilaterally and without any notice to the district began looking for a new school for L near the end of the summer of 1994. Their withdrawal of L from Westview was a total surprise to L's teachers. I do not condone such actions.

I find the parents' actions were conducted in such a fashion that L immediately and correctly assumed that she would not attend Westview for 1994-95. L then began acting up whenever a suggestion was made she might "have to" return to Westview. I also do not condone these actions by parents.

41. A. Parents unilaterally withdrew L from the district on or about 9/29/94. They enrolled L in Denver Academy for the 1994-95 school year, and re-enrolled her there for the 1995-96 and 1996-97 school years. L attended Denver Academy from about 9/29/94 through at least the date of the last hearing, in November of 1996.

B. Denver Academy is a private, segregated school for disabled children. It offers tiny classes, a minuscule staff-student ratio, immediate one-on-one attention, and a teaching cadre consisting entirely of special education or special education trained teachers. Every teacher, including special education teachers, start at Denver Academy as teacher's aides regardless of educational and work background. They must meet Denver Academy's rigorous special education training standards before being promoted to "teacher."

C. Not surprisingly, educational costs at Denver Academy substantially exceed the funds available to the district to educate public school students. Parents paid tuition of $7,245 to Denver Academy for the 1994-95 school year; for the 1996-97 school year it had risen to $9,500. These charges are reasonable for the services provided.

D. In contrast to Denver Academy, the district's PPOR (Per Pupil Operating Revenues) for 1994-95 was $3,602, to which IDEA "generously" added $355 per disabled student. For 1996-97, the PPOR was $4,164 and the IDEA funds were estimated at $350.

42. Parents contend and the district does not seriously challenge that L made meaningful educational progress while at Denver Academy. Given the characteristics of Denver Academy, I suspect it would be terribly difficult for any student not to make meaningful educational progress there. I find L did make meaningful educational progress since being at Denver Academy.

43. A. The services provided to L at Denver Academy tried to maximize her educational potential and go well beyond those services needed to enable L to obtain meaningful benefits from a public school education.

B. Such services also address, if not are primarily directed to remedy, L's alleged emotional problems, ADHD and CAPD. As noted earlier in this Decision, I found none of these to be educational disabilities to the degree the district was required to attempt to remediate same.

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44. I find Dr. Sadler's testimony regarding the issue of whether L is able to attend and obtain meaningful educational benefit from a public school to be far more persuasive than the evidence to the contrary. I find that Denver Academy is not the least restrictive appropriate educational setting for L. I find no reason why she cannot be educated in a public school, if appropriate special education and related services were to be furnished. To the contrary, I specifically find that L can be educated in a public school if appropriate special education and related services were to be provided.

45. A. However, from the time L started middle school, the district has failed to provide appropriate special education and related services to L. Therefore, I find due to the absence of an appropriate program being offered L in a public school, L had no other alternatives. Thus, for the times in the past relevant and for now, Denver Academy is the least restrictive alternative educational setting for L.

B. I find no benefit and substantial possible detriment to L should she be removed from Denver Academy prior to the close of Denver Academy's current school year.

Based upon the above Findings Of Fact, I make the following CONCLUSIONS OF LAW:

46. At all times herein relevant, L was:

A. A student of the Respondent district.

B. Disabled due to a specific learning disability, dyslexia, and as a result was entitled to receive a FAPE from the district pursuant to IDEA to address her dyslexia.

47. A. Since L started middle school, the district has failed to provide her with a FAPE pursuant to IDEA in at least the following respect: the district has not provided L with those special education and related services for her dyslexia as are necessary to enable her to obtain meaningful educational benefits. This failure is serious and material.

B. Due to this failure, parents obtained at their expense private schooling for L at Denver Academy. Denver Academy was an appropriate placement for L.

C. This failure of the district to provide L with a FAPE entitles parents to some retroactive reimbursement from the district for the Denver Academy tuition, Burlington School Committee v. Mass. Depart. of Education, 471 U.S. 359 (1984). That Denver Academy is not an accredited school is not relevant, Florence County School District Four v. Carter, 510 U.S. 7, 20 IDELR 532 (1993).

D. Parents' right to reimbursement is an equitable remedy and a right to some reimbursement is not automatically a right to 100% reimbursement, Burlington, supra; Florence County, supra. In fashioning such relief, I must give and have given consideration to "..all relevant factors, including the appropriate

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and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if [I] determine[s] that the cost of the private education was unreasonable." Florence County, supra, 20 IDELR at 534.

E. As noted in paragraph 43 above, the Denver Academy services exceed those educational services which the district was required to provide, Board of Education of Hendrick Hudson Central District v. Rowley, 458 U.S. 176 (1982). I have no doubt that most, if not all, parents would be delighted to have their local public school provide education in the fashion provided at Denver Academy. Unfortunately, most, if not all, taxpayers are unwilling to pay the taxes needed for public schools to do so and therefore disabled or non-disabled public school children are not entitled to same. Therefore, parents here are not entitled to 100% tuition reimbursement.

F. I have great difficulty in determining what portion of the Denver Academy tuition qualifies for reimbursement as being reasonably related to L needs as discussed in this Decision. At a minimum, parents should be reimbursed for the combined amount of PPOR and IDEA funds the district would have received and spent to educate L had the district offered her a FAPE. That the district did not receive those funds because L did not attend school in the district for the relevant years is immaterial, as same is a problem of the district's own creation.

48. Since L started with the district, the district has also failed to provide her with a FAPE pursuant to IDEA in at least the following respects:

A. The district failed to properly advise parents of their due process rights each time the district was required by IDEA to provide said rights to parents, including but not limited to their rights to a hearing when the district refused to pay for placement at Denver Academy.

B. The district failed to properly prepare L's IEPs in that no measurable short and long term goals and objectives were provided.

C. The district failed to evaluate L for ESY services.

49. Despite the deficiencies noted in paragraph 48(A) and (B), from a practical standpoint L did receive appropriate special education and related services from the district which offered L the opportunity to make reasonable educational progress, until she started middle school. Until L started middle school, she did make reasonable educational progress. Therefore, in this case, the deficiencies noted in paragraph 48(A) and (B) are more technical than substantive. Parents are not entitled to retroactive reimbursement for private tutors, including Sylvan Learning Center, except as otherwise noted in paragraph 50, Independent School District No. 283 v. S.D., _____ F.2d _____, 24 IDELR 375 (8 Cir. 1996).

50. The deficiency noted in paragraph 48(C) is more than merely technical and, but for the unilateral action of parents in providing educational enrichment to L over the summers at their expense, could have resulted in substantial educational harm to L. Said deficiency entitles parents to retroactive reimbursement for all summer tutoring programs, including but not limited to Sylvan Learning Center (for school summer vacations only) and the cost of parents of the district's summer reading program which L attended at parents expense, Burlington, supra.

It is therefore ORDERED:

51. The parties shall immediately confer in good faith in an attempt to reach an agreement on the amount of Denver Academy tuition reimbursement that is due in accordance with this Decision. The parties shall report to me by joint letter, no later than January 31, 1997, whatever agreement they have reached or that no agreement has been reached. If no agreement has been reached, the parties shall contact my office on February 3, 1997 at 9:00 a.m. to schedule a date to reconvene this hearing for me to take additional evidence as to the proper amount of reimbursement due. Such agreement shall not affect either parties' right to appeal this decision, including the issue of whether parents are entitled to any reimbursement.

52. Pursuant to the procedure noted in paragraph 51 and subject to those dates, the parties shall likewise attempt to agree on the amount due for reimbursement per paragraph 50.

53. Pursuant to the procedure noted in paragraph 51 and subject to those dates, the parties shall likewise attempt to agree upon any additional findings, conclusions or order which either or both party deem necessary or desirable to fully adjudicate this case. By this provision, I am attempting to avoid the necessity for any remand for additional findings, conclusion or order or the need for any reviewing authority to make same due to my failure to fully adjudicate every issue presented by this case.

54. By January 31, 1997, parents shall notify the district in writing whether the parents desire the district to propose and provide L with a FAPE in a public school for school year 1997-98.

55. If parents decide against same, the district's financial responsibility for L's education ends with the close of the regular 1996-97 Denver Academy school year. I intend that in the absence of totally unforeseen and presently unforeseeable future changed circumstances that such decision by the parents shall estop them prior to the 1998-99 school year from seeking any educational services and/or financial assistance from the district. I specifically intend that in the absence of totally unforeseen and presently unforeseeable future changed circumstances that the

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parents not wait beyond January 31, 1997 to seek educational services for L and then attempt to rely upon the "stay put" provisions of IDEA as a basis to keep L at Denver Academy for the 1997-98 school year in whole or in part at public expense.

56. A. If parents do, in good faith, notify the district that they intend to return L to the district for educational services for the 1997-98 school year if the district provides L with a FAPE, at a minimum the following shall occur unless the parties agree otherwise:

(i) The parents and the district shall fully cooperate with each other to have L assessed and staffed no later than March 17, 1997. A proposed IEP shall be prepared no later than April 7, 1997. Both parties shall either agree to or seek a due process hearing regarding that IEP no later than April 21, 1997.

(ii) The staffing process shall include L taking whatever standardized test battery currently used by the district to determine current educational functioning. The results shall be available to the staffing team.

(iii) My findings as to L's probable age and the results of the educational testing shall be considered by the staffing team in determining what grade L shall enter for the 1997-98 school year. That grade shall be part of the IEP and subject to due process. While L's current school grade may have some relevance to that decision, I do not intend to perpetuate the problems of the past which pushed L into the next higher grade regardless of her inability to handle the new grade's materials.

(iv) If the educational tests report that L is functioning below the level of the grade she is to enter, the IEP shall specifically identify by quantity each and every special education and related service the district is to provide to allow her a fair chance to succeed in that grade.

(v) The IEP shall specifically identify reasonable career goals for L and shall specifically identify exactly how same are to be addressed for the year L enters public school through her expected graduation date.

(vi) The IEP shall specifically address in detail a plan to emotionally transition L from Denver Academy, including how to make same a positive action for L. The district shall consider as part of the IEP the provision of such services as the staffing team determines reasonable to counsel parents how to emphasize the positive nature of the upcoming change.

B. Unless the parties otherwise agree, I am specifically reserving jurisdiction to hear and rule upon any disputes arising out of implementation of the preceding. This case has been a tremendous financial burden on both parties. As a result of my involvement, I have substantial knowledge not available to another hearing officer. It would be a travesty for another hearing officer to have to attempt to re-learn everything involved in this case.

Dated: 1-10-97

Bruce C. Bernstein
Impartial Hearing Officer

Certificate of Mailing

The undersigned certifies that a true and correct copy of the within Decision was placed in the U. S. Mails, postage prepaid, on January 10th, 1997, addressed to:

William R. Baesman, Esq.
POB 2525
Littleton CO 80161

Susan S. Schermerhorn, Esq.
Caplan and Earnest LLC
2595 Canyon Blvd., #400
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Colorado Dept. of Education
Special Education Services Unit
201 E. Colfax Avenue
Denver CO 80203-1704

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Case No.: L96:107

Status: Impartial Hearing Officer Decision

Key Topics: Evaluation Procedures
Eligibility for Special Education
Manifestation Determination
SIED (Significant Identifiable Emotional Disability)

Issues:

- Did the school district violate applicable law in denying the parent's request for an independent evaluation at public expense?
- Was the school district correct in its determination that the student did not qualify for special education?
- Was the "manifestation hearing" conducted in accordance with applicable law, including proper procedural safeguards?
- Was the school district's determination, that the conduct which resulted in the student's disciplinary suspension was not a manifestation of her disability, appropriate and supported by the evidence and law?

Decision:

- Given all of the evaluation information which was available, from both the school district and independent sources, the IHO finds that the requirements for Evaluation Procedures under IDEA have been satisfied.
- There is not a sufficient factual basis from which to find that the student is seriously emotionally disturbed or otherwise qualifies for services under the IDEA.
- The IHO finds that the manifestation proceeding was procedurally adequate to meet legal requirements, including reasonable notice to the parent and the requirements of IDEA.
- The IHO finds that the school district's determination, that the student's conduct was not a manifestation of the student's disability, was appropriate and supported by the evidence.

Discussion:

- Discussion of what qualifies as "SIED behavior".
- Testimony regarding the student's past conduct.
- Issues of the student's drug abuse recovery status and pregnancy in relation to eligibility under IDEA.

DUE PROCESS HEARING
BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

Case No. L96:107

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF:

The Educational Placement of [redacted], through her mother, [redacted] and PUEBLO SCHOOL DISTRICT NO. 60

A Due Process Hearing in this matter began on May 1, 1996, and concluded on May 7, 1996. The Hearing was conducted in Pueblo, Colorado, on the campus of the University of Southern Colorado. The Hearing process had been continued until May 7 at the mutual request of the parties. The Hearing Offer agreed to the continuance because the Parent did not want the Student to attend school in the School District for the remainder of the 95/96 school year regardless of the outcome of the Hearing.

For reasons of her personal privacy, [redacted] will hereafter be referred to as "the Student." The Student was represented by her attorney, Melinda Badgley-Orendorff, esq., and by her mother, [redacted] both of whom were present for the entire hearing. At the mother's request, the Student was not present except when she testified.

Pueblo School District No. 60 was represented by its attorney, Jill Mattoon, esq., and by its representatives, Pam Jacobson and Dr. Brian Printz, who alternately were present as the School District's representatives.

The Impartial Hearing Officer was Peggy S. Ball, Esq. (IHO).

The Hearing was open to the public, although witnesses were sequestered. Counsel elected to submit their closing arguments in written form. The School District presented its case first, by stipulation between the parties.

BACKGROUND

On December 12, 1995, the Student struck one of her teachers at the Pueblo School for the Arts and Sciences (PSAS). As a result, she was suspended by the School District with a recommendation for expulsion.

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The Student had been receiving Section 504 services, but had not been identified as a Student for special education services pursuant to the IDEA.

On January 24, 1996, a Manifestation Proceeding was held (Manifestation Proceeding) to determine whether the conduct which resulted in the proposed disciplinary action was a manifestation of the Student's Section 504 disability. At this proceeding it was decided that the Student's conduct leading to discipline was not a manifestation of her Section 504 disability.

The Student had been identified to have a Section 504 auditory processing disability in approximately April of 1994.

The Parent requested a staffing to determine whether the Student was eligible for special education services pursuant to the IDEA as an SIED student. This eligibility proceeding was held on January 26, 1996 (eligibility proceeding). At this proceeding it was determined that the Student was not eligible for special education services under the IDEA.

The Parent requested that an outside evaluation be completed at School District expense. The School District denied this request on February 2, 1996, responding that they felt the existing evaluations were adequate.

On February 27, 1996, the Student was expelled from the School District by the School Board. The Student may apply for readmission to the School District after the conclusion of the 1995/96 school year. (Exhibit 16)

ISSUES

Each of the parties in this matter had requested a due process hearing.

The issues identified by the Student (paraphrased) were:

1. Did the School District violate applicable law in denying the Parent's request for an independent evaluation at public expense?

2. Was the School District correct in its determination that the Student did not qualify for special education?

3. Was the "Manifestation Hearing" conducted in accordance with applicable law, including proper procedural safeguards?

4. Was the School District's determination that the conduct which resulted in the Student's disciplinary suspension was not a manifestation of her disability appropriate and supported by the evidence and law?

The issues identified by the School District were:

1. Did the School District violate applicable law in denying the Parent's request for an independent evaluation at public expense?

2. Was the School District correct in its determination that the Student did not qualify for special education?

(Note: Although information is divided into subcategories below, for purposes of clarity, much of it relates to more than one topic heading and the divisions are not intended to be exclusory.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Manifestation Proceeding

One of the issues raised by the Parent was the fact that the initial 504 accommodation planning document listed the Student's low tolerance for frustration as an issue for accommodation. Witnesses for the School District testified that this low tolerance for frustration was a consideration in planning for the Student, but was not a disability in and of itself.

The Parent felt that the Student had exhibited growing frustration leading up to the disciplinary incident, and that this frustration had been caused by her frustrations with schoolwork and the school's failure to follow the Section 504 guidelines. The Parent had requested a Section 504 staffing to address these concerns, but the incident occurred before such staffing was to occur.

Martin Quintana, the Special Education Coordinator and Section 504 Coordinator for the School District, testified that he met with the Student, the mother and Dr. Printz on January 17, 1996, at which time they reviewed the results of the psychological evaluation, selected the date for the staffing, and discussed the purpose and procedures of the Manifestation Proceeding - which was to determine whether there was a nexus between the disability and the infraction. Mr. Quintana stated that he had a discussion with the Parent regarding why he felt procedural safeguards required that the manifestation decision be reached separately before the eligibility determination was considered, and that he discussed the consequences of potential results with the Parent. Dr. Printz also testified to his recollections of this meeting with the Parent. Mr. Quintana was the facilitator for the Section 504 staffing, and indicated that he explained the purpose of the Section 504 Manifestation Proceeding at the beginning of the proceeding. Written notification was also provided. (Exhibit 9)

The Parent acknowledged that Mr. Quintana had called her to notify her of the dates of the two proceedings, and that she had procedures with her at the meeting with Dr. Printz before the proceedings occurred. However, the Parent stated that she did not understand Mr. Quintana's explanation, and therefore went home and waited for something to come in the mail. The Parent stated that she believed the Manifestation Proceeding was an interim procedure for information only, and that the School Board would be conducting a more formal Hearing to determine the issue before making the disciplinary decision. The Parent was accompanied by her attorney to the Manifestation Proceeding.

The Parent testified that she does not want the Student to return to the School District at this time. This makes it difficult to understand the Parent's purpose in seeking this Hearing. In part, the Parent stated that she does not want the Student to return because she feels the School District does not follow the Section 504 plan. However, the parties stipulated that the issue of whether the School District was following the Section 504 plan was not presented for decision at this Hearing.

Dr. Pantleo, the Dean of the Pueblo School of Arts, the school which the Student had been attending at the time of the expulsion, reviewed the Student's disciplinary history for the 1995/96 school year as follows:

1. On September 18, 1995, the Student was reprimanded for use of profanity and defiance of authority.

2. On November 9, 1995, she was also written up for defiance of authority in an incident regarding Ms. Spicer. Dr. Pantleo had a meeting with the Student to establish conditions for her continued participation at PSAS.

3. On November 16, 1995, the Student was suspended briefly for possession of cigarettes. The Student had voluntarily surrendered the cigarettes and had indicated she kept them in her backpack so that she could smoke outside of school.

Ms. Spicer, the Spanish teacher, described the December 12, 1995 incident as follows: She stated that the Student was being very rude, making loud comments such as "I hate Spanish." Ms. Spicer asked her to go to an empty room next door and wrote up a violation. When Ms. Spicer went next door, the Student called her a bitch and hit her with a fist full of rolled up papers. She states the Student's comment was "I've been wanting to do that ever since I met you." "You're such a bitch." Ms. Spicer stated that the Student lunged at her again after they had gone to Mr. Pantleo's office.

The Student described the incident as follows: The class was noisy, and Ms. Spicer was trying to keep people quiet. The Student said "You be quiet!", to the teacher, which she intended as a joke but the teacher took seriously. She was sent to an empty room. The teacher came in and said that she would give her a violation. The Student said "Fine, I'll be expelled." As she left, the Student smashed a balloon man project with her foot and pusher up against the teacher with her papers. (See also Exhibit I)

Ms. Spicer acknowledged that the Student was better behaved and had a good sense of humor when she was not frustrated, but began to get an "attitude" when she became frustrated.

The Student's stepfather, [redacted] testified that the Student became frustrated when she was tired.

The IHO finds that the Manifestation Proceeding was procedurally adequate to meet legal requirements, including reasonable notice to the parent and the requirements of 34 C.F.R. 104.36. The Parent clearly had actual notice and was a full participant in the proceedings. The Parent contends that she did not fully appreciate the finality of the proceedings, but she had an attorney present with her at the Manifestation Proceeding, and she had several opportunities to talk at length with school district personnel and ask questions.

The Parent also raises the issue of whether the evaluation information for the Manifestation proceeding was adequate to meet the requirements of 34 C.F.R. 104.35. The IHO finds that the measures employed and/or reviewed by Dr. Printz provided adequate information for consideration by the staffing team in making the Manifestation decision, consistently with the requirements of 34 C.F.R. 104.35. Dr. Printz' evaluation included the gathering of information from teachers and other significant people in the Student's life, the MMPI(adolescent), the Behavior Assessment Scale, Reynolds Adolescent Depression Scale, a detailed review of her school records, and other methods described more fully in his report, Exhibit A.

The Parent requests review of whether the decision at the Manifestation Proceeding, finding no nexus between the student's conduct and her Section 504 disability, was appropriate and supported by the evidence. The IHO finds that it was. Although this Student has had a tragic number of problems and setbacks in her life, there is no basis to refute the staffing team's conclusion that her conduct in striking her teacher was caused by, or related to a disability defined by Section 504.

II. Eligibility Proceeding

Dr. Printz testified that SIED is considered to be a severe label to put on a student, and must be based upon a long-lasting condition, rather than transient problems. He testified that he had reviewed the Student's school records, and that the records did not indicate the history of persistent out-of -control behavior and frequent disciplinary intervention that characterized an SIED student.

Counsel for the Parent raised the issue of whether the hitting of the teacher did not, by definition, qualify as SIED behavior. Dr. Printz responded that isolated or sporadic behaviors do not qualify a Student for SIED, but rather that the behaviors must be pervasive and must have an impact on educational or social function. Dr.

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Printz testified that although the Student has had long-lasting emotional concerns, these concerns have not had an apparent impact on her educational functioning. He stated that out of control behavior does not have to occur 24 hours per day in order to qualify a student for an SIED label, but reiterated that the behaviors must be frequent and persistent.

The Parent also raised the issue of whether the Student has an Oppositional\ Defiance Disorder. Dr. Printz testified he did not look at that issue specifically, but that she did not appear to qualify because she had good relationships as well as bad relationships, and her opposition was not pervasive.

Dr. Printz had reviewed a report from a Dr. Rodriguez, Ph.D., recommending special education placement for a learning disability (Exhibit 15). However, Dr. Printz opined that the assessment tools used by Dr. Rodriguez were not consistent with School District standards.

Dr. Smith, Ph.D., a licensed Psychologist, testified that she has seen the Student on three occasions, beginning April 19, 1996. His clinical impression of her is: depressive disorder, anxiety, opposition/defiance disorder, and polysubstinate disorder in remission. He testified that he would classify approximately 25% of all 17 year-old people as oppositional/defiant at some time during their teen-age years. He testified that he is not familiar enough with the IDEA to render an opinion regarding the Student's eligibility, but that he feels the conditions he has diagnosed would have a significant impact on all areas of her life, both academic and non-academic. He would expect the Student to have difficulty interacting effectively, making good decisions, and controlling anger.

Rich Guerrero, the Assistant Principal at Centennial High School, testified regarding the Student's conduct during the 1994-1995 school year, when she was in the 9th grade. He testified the Student did not have any suspensions that year. He had received a complaint from the drama teacher that the Student had become rude in class because the teacher had asked her to put her makeup away. He testified that her biggest problem was poor attendance. He stated that she usually managed to avoid fights with her peers, but occasionally got into trouble for "mouthing off" at teachers.

Cheryl Califano, the Principal of Freed Middle School, also testified. He was the Assistant Principal at Freed Middle School while the Student was there. He testified that he recalled four or five incidents regarding the Student. In one incident, a security guard brought her in because she had been unable to get into the building, and had kicked a glass panel in a door. She also got into problems with her math teacher, and at the end of the year there was a situation where she did not have a permission slip for a field trip so she had a neighbor take her. Mr. Califano stated that the Student was never suspended but did occasionally have detention, usually because of verbal incidents with her math teacher.

Dave Williams, a Counselor at Pueblo School for the Arts, testified that the Student tended to react to people according to how she was treated by them. If treated respectfully, she would respond in kind. However, he stated she was very emotional at times.

One of the Parent's primary concerns was that although the issues were discussed during both staffings, she felt not enough consideration was given to the continuing effects of drug abuse recovery, pregnancy, and sexual abuse recovery on the Student's behavior and ability to function in the educational environment.

The Student's mother and her stepfather testified that in the summer of 1995, the Student was out of control at home, and began using illegal drugs. The Student herself testified that she had begun to smoke marijuana at the end of the 1995 school year. Although she acknowledged having tried one or two other illegal substances, she stated the only substance she used consistently was marijuana. The situation was out of control for approximately two months, during which time the Student frequently would stay out most of the night. On one occasion she disappeared for three days. At the end of that summer, the Student participated in a drug rehabilitation program. Everyone seemed to agree that the Student has not used illegal drugs since that time.

The Student learned she was pregnant in early January of 1996, and her baby is due in September. She has had a high-risk pregnancy.

The Student was sexually abused on three separate occasions between the ages of approximately 9 and 11, and received extensive counseling at that time.

The Parent objected that although Dr. Printz met with her prior to the staffings to review the reports of his Psychological testing, she was not shown the actual test questions. She also objected to, and discontinued, the use of the MMPI test because it included questions regarding attitudes about sex and religion.

"Serious Emotional Disturbance" is defined for purposes of the IDEA in 34 C.F.R. 300.5(8). The IHO finds there was evidence that the Student has demonstrated some of the definitional characteristics, including physical or somatoform symptoms, and possibly a general pervasive mood of unhappiness or depression. However, the IHO does not find evidence from which to conclude that the decision of the staffing team that such symptoms were insufficient to qualify the Student for Special Education Services for purposes of the IDEA was erroneous, in light of the regulatory requirements that the characteristics must occur "over a long period of time and to a marked degree, which adversely affects educational performance," and must qualify as serious emotional disturbance rather than social maladjustment. The Parent's primary concern was that the staffing team did not adequately consider the Student's pregnancy and drug abuse recovery status. The IHO finds that the effects of pregnancy do not fall within the scope of the IDEA or Section 504. The IHO agrees with witnesses who opined that many young people have had a brush with illegal substances, and it would be a disservice to classify them as seriously emotionally disturbed on that basis. In so ruling, the IHO acknowledges that these issues are appropriate items to be considered in evaluating a student's total assessment picture, and that the parent stated she was not committed to the SIED label, but merely wished to obtain help for her daughter under some format. However, there is not a sufficient factual basis from which to find that the Student is seriously emotionally disturbed or otherwise qualifies for services under the IDEA.

III. Evaluation

Dr. Printz testified that he was originally contacted to conduct an evaluation in relation to the manifestation issue. However, he also received a request from the Parent to include an assessment regarding whether the Student qualified for special educational services on the basis of SIED. Dr. Printz testified that he conducted an interview and two assessment sessions with the Student, solicited reports from the Student's teachers and reviewed reports of previous assessments, including information from the Student's pastor, Scott Johnson.

The Student had been tested on at least three prior occasions, not including her work with Pastor Johnson. The Student had been qualified as a special education student in Kansas when she was younger. She had been tested twice in Colorado, and it had been determined she was not eligible for special education services, reportedly because she had borderline intelligence and her educational achievement actually exceeded expected levels.

Dr. Printz testified that the Student has now been assessed on four separate occasions, that there is a concern this sends an implied message to the Student that something must be wrong with her, and that the validity of the testing decreases as a result of the practice.

The Parent's primary issue, according to counsel's closing argument, is that "there was no assessment done pertaining to [the Student's] pregnancy or drug rehabilitation, particularly as they related to SIED." The Student's pregnancy had just manifested itself, and the Student was in rehabilitation treatment for the drug abuse issue. Its not clear what further assessment would have been applicable to evaluate those issues. Given all of the evaluation information which was available, from both the school district and independent sources, the IHO finds that the requirements of 34 C.F.R. 300.532 have been satisfied.

The Parent also objects that the notice of denial (Exhibit 11) is insufficient in that it does not include a description of each evaluation procedure, test, record or report upon which the denial was based. However, the Parent had previously received the report from Dr. Printz, and had an opportunity to meet with him and to talk to him again at the staffings.

Accordingly, due process provisions, including 34 C.F.R. 300.532, appear to have been satisfied.

STATEMENT REGARDING RIGHTS OF APPEAL

Either party may obtain state level review of this decision of the IHO. The state level review will be conducted by an Administrative Law Judge of the Colorado Department of Administration, Division of Administrative Hearings.

Any party who seeks to appeal this decision shall file with, or mail to, the Division of Administrative Hearings, The Colorado Department of Education, and all other parties in the proceeding, **within 30 days after receiving this decision,** the following:

1) A Notice of Appeal; and

2) A designation of the Transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

Within five days after receiving a Notice of Appeal, any other party may file a cross-appeal.

Further information regarding appeal procedures is attached.

Peggy S. Ball

Peggy S. Ball
Independent Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of June, 1996, I deposited a true and correct copy of the foregoing in the United States mail, postage prepaid, Certified Mail, Return Receipt Requested, addressed to the following:

Jill S. Mattoon, Esq.
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Crockenberg and Garcia, P.C.
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P. O. Box 35
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Melinda Badgley-Orendorff, Esq.
490 North Main
Suite 413
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Charise A. Tracy

Case No.: **S96:107**

Status: State Level Review

Key Topics:
Evaluation Procedures
Eligibility for Special Education
Manifestation Determination
SIED (Significant Identifiable Emotional Disability)

Issues:

- Did the IHO abuse her discretion and err in reaching her conclusions?

(See issues of Case No. L96-107)

Decision:

- The local level hearing procedures in this matter complied with the requirements of due process.
- The manifestation proceeding and placement determination conducted by the District...and the evaluation of the student performed by the district in preparation for that manifestation proceeding were conducted in compliance with applicable procedural and substantive requirements.
- The student's conduct resulting in her suspension and expulsion was not a manifestation of her disability.
- The District's evaluation of the student was appropriate and the student was therefore not entitled to an independent evaluation at public expense.
- The student does not qualify for special education as an SED or SIED student.

Discussion:

- Decision of the IHO.
- Jurisdiction and statutory background.
- Mootness and relief sought.
- Procedural compliance in connection with local level hearing.
- Compliance with relevant law, including proper procedures, in connection with the manifestation hearing.
- Correctness of the manifestation decision.
- Appropriateness of the district's evaluation.
- Correctness of the special education eligibility determination.

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 96-09 S96:107

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[redacted], through her parents [redacted] and [redacted]
Appellant,

v.

PUEBLO SCHOOL DISTRICT NO. 60,
Appellee.

This is a state level review of a decision of an impartial heating officer pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 *et seq.* ("the Act" or "IDEA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794; ("Section 504"); the Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.*, C.R.S. (1995 &1996) ("ECEA"); and Part II, Section A, VII of the of the Colorado Department of Education, Fiscal Years 1995-97 ("the State Plan").

A local level evidentiary hearing was held before an impartial hearing officer ("IHO") in accordance with the IDEA, Section 504, ECEA and the State Plan in May 1996. A written decision was issued on June 7, 1996.

An appeal was subsequently filed by Appellant [redacted] (hereinafter "the student") through her parents [redacted] and [redacted] (hereinafter "R.N." and "D.N." or "the parents") (collectively "appellant"). Pueblo School District 60 ("appellee" or "the District") did not file a cross appeal. Upon request of appellant an additional evidentiary hearing was held on September 16, 1996, at which both appellants and the appellee presented additional evidence. Briefs in this matter were filed on October 15, 1996, October 28, 1996, and November 4, 1996, at which time this matter was ready for decision. The parties have waived the time limits set forth in the State Plan and applicable federal regulations with respect to this state level review.

Appellant and her parents are represented in this matter by Melinda Badgley Orendorff, Esq. The District is represented by Jill S. Mattoon, Esq. of Petersen, Fonda, Farley, Mattoon, Crockenberg and Garcia, P.C. The student was present

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during the hearing before the IHO only when she testified. She did not appear at the state level review hearing. Both hearings were open to the public.

SCOPE OF REVIEW

Pursuant to the IDEA, ECEA and the State Plan, the Administrative Law Judge's decision on state level review is to be an "independent" one and the Administrative Law Judge is permitted to seek and accept additional evidence, if necessary. 20 U.S.C. §1415(c) and (d); 34 C.F.R. §300.510; State Plan. Part II, A, VII, B, 9, b; and 2220-R-6.03(11)(b)(v) (1 CCR 301-8). Similarly, in the context of judicial review under the IDEA a reviewing court may take additional evidence, 20 U.S.C. §1415(e)(2), and is also required to render an independent decision. Cases construing this provision (applicable here by analogy) have held that in conducting such reviews courts must give "due weight" to the findings at the state level. *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206 (1982); *Burke County Board of Education v. Denton,* 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990). In so doing, reviewing courts have discretion to give appropriate weight to the findings below. *Town of Burlington v. Department of Education, Commonwealth of Massachusetts,* 736 F.2d 791-92 (1st Cir. 1984), *aff'd on other grds, sub nom School Committee of the Town of Burlington v. Department of Education of Massachusetts,* 471 U.S. 359 (1985). If the findings below have been made in a regular manner and with evidentiary support they are entitled to presumptive validity, but such deference must be more limited than would normally be the case in reviews of agency fact-finding, in light of statutory provisions for independent decisions and additional evidence-taking. *Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991): Kerkam v. McKenzie,* 862 F.2d 884 (D.C. Cir. 1988). Such a review has been characterized as a "modified *de novo*" review. *Murray v. Montrose County School District,* 51 F.3d 921, 927 (10th Cir. 1995).

With respect to the aspects of this matter which fall under Section 504 of the Rehabilitation Act of 1973, school districts are required to "establish and implement . . . a review procedure," 34 C.F.R. §104.36, the parameters of which are undefined. In the absence of more specific guidance, the Administrative Law Judge concludes that it is appropriate to apply to the Section 504 claims in this appeal the state level review procedures and standards applicable to the IDEA aspects of this matter.

ISSUES UPON STATE LEVEL REVIEW

The student, identified in 1994 as having a disability under Section 504 of the Rehabilitation Act of 1973, was expelled from school by the District in February 1996, following an incident in which the student struck one of her teachers in the face. The expulsion occurred following a determination by the District that the student's actions in striking the teacher were not a manifestation of her identified disability and following a further determination by the District that Respondent did not qualify for special education under the category of Significant Identifiable Emotional Disturbance. At the IHO local level hearing the student argued that the District failed to comply with procedural requirements concerning these determinations; that these decisions were in error; and that the District acted improperly in denying the parents' request for an independent evaluation at public expense. [1] The IHO rejected each of these claims, concluding that the District had acted properly in all respects.

In this appeal the student reasserts each of the arguments she raised below. Thus, on appeal the student asserts the IHO abused her discretion and erred in reaching her conclusions that:

1. The "manifestation hearing" was conducted in accordance with applicable law, including procedural safeguards;

2. The District's "manifestation determination" (*i.e.* that the student's conduct resulting in her suspension and expulsion was not a manifestation of her disability) was appropriate and supported by the evidence and law;

3. The District was correct in its determination that the student did not qualify for special education; and

4. The District did not violate applicable law in denying the parents' request for an independent evaluation at public expense.

DECISION OF IHO

In the present case the student contests the IHO's conclusions of law. In addition, the parties appear to contest some of the factual *issues* in this matter. However, in her decision the IHO generally did not separate factual findings from ultimate or legal conclusions and for the most part summarized testimony rather than entering discrete factual findings. It is therefore difficult to identify specific factual *findings* of the IHO or to determine which specific findings are in dispute. Furthermore, the decision of the IHO contains some factual gaps concerning matters about which there is no apparent dispute. In light of these matters and the fact that additional evidence was taken at the state level review proceeding, the findings of fact which follow do not reference or reject any factual determinations of the IHO. The Administrative Law Judge's findings are based on an independent review of the record below and consideration of the testimony taken at the state level review hearing, with due weight having been given to the implicit (as well as any explicit) factual findings of the IHO, as appropriate.

FINDINGS OF FACT

1. At the time of the hearing Appellant was a 17 year-old high school student (D.O.B. 11/3/78).

2. The student was sexually abused on three separate occasions between the ages of nine and eleven and received extensive counseling at that time.

3. In 1992, after moving to Colorado, the student was assessed by the District to determine whether she met Colorado Department of Education Special Education guidelines as a Perceptual-Communicative Disabled student. A staffing team at that time determined the student did not meet these guidelines because there was a lack of discrepancy between her academic achievement scores and her overall cognitive skills.

4. During the 1993-94 school year while the student was an eighth grader at the District's Freed Middle School she was re-evaluated by District school psychologist Rob Finkel because she was experiencing academic difficulties.

5. Finkel performed a psychoeducational assessment consisting of administering the Wechsler Intelligence Scale for Children-III (WISC-III), the Wechsler Individual Achievement Test (WIAT) and the Bender Visual Motor Gestalt Test (Bender). In addition, Finkel conducted informal interviews with special education teachers and D.N. and reviewed the student's cumulative records. The Weschler scales utilized by Finkel in his evaluation are the standard and accepted instruments for assessing cognitive ability and achievement. Finkel completed his assessment in April 1994.

6. Finkel determined that the student's overall cognitive functioning was in the borderline range (full scale IQ of 75), with verbal skills significantly stronger and better developed than non-verbal skills. Finkel concluded that the student "may be significantly challenged on most academic tasks, with her information processing style being of significant concern." However, he also determined that with the exception of mechanical math skill development, the student's "measured academic skills appear to be well over measured ability levels on the WISC-III." Finkel also noted that all the student's academic skills "appeared to be at, and significantly above her measured ability level." This finding was consistent with the results of the student's testing in 1992. The Administrative Law Judge determines Finkel's findings were accurate and appropriate.

7. Following this assessment a determination was made (because the student's academic skills were at or above her ability level) that the student did not qualify for special education services under the Individuals with Disabilities Act ("IDEA").[2] However, at a staffing held on May 3, 1994, it was determined the

student did qualify as a Section 504 student pursuant to the Rehabilitation Act of 1973 and a Student Accommodation Plan ("504 plan") was developed for her.

8. The student's May 1994 Section 504 plan described the nature of the concern about the student to be: "Slow information processing, in combination with low frustration level," and further noted a concern relating to "auditory retention." The "basis for the determination of handicap" was noted to be: "Auditory retention is a concern--needs instructions presented in a concrete way, with both verbal [and] written forms. Does not qualify under IDEA guidelines." In response to the query: "Describe how the handicap affects a major life activity," the 504 plan noted that the student "Has low self frustration (*sic*) levels which impacts (*sic*) her ability to stay on task and complete assignments." Among the accommodations planned for the student were modification or reduction of assignments with additional time allowed for completion; sequential learning; and concrete hands-on teaching materials, when appropriate.

9. In the spring of 1994, D.N. was interviewed by a District social worker in connection with D.N.'s concerns about the student's academic progress. At that time D.N. reported that the student generally got along with other children, "except aggressive students." D.N. also reported that the student got along well with adults. D.N. reported concerns about the student's sleeping problems and depression and described the student as passive/aggressive and having low self-esteem. D.N.'s major concerns relating to the student concerned academic issues. She did not report any abnormal aggressiveness or violent behavior at this time.

10. Neither of the District's evaluations in 1992 or 1994 evaluations documented that emotional, social or behavioral problems had been significantly impacting the student's academic or social functioning at school.

11. In May 1994, D.N. also had a private licensed psychologist, Dr. Carlos Rodriguez, evaluate the student. Rodriguez' psychological evaluation, consisting of testing and a clinical interview of the student and her mother, was completed on May 19, 1994 (and thus apparently was not considered at the time of the Section 504 staffing). In connection with the evaluation Rodriguez administered the Adolescent Drinking Inventory, the Reynolds Adolescent Depression Scale, the Minnesota Multiphasic Personality Inventory (MMPI), the Kaufman Brief Intelligence Test, and the Wide Range Achievement Test. Rodriguez diagnosed the student as having Dysthymia (depression); somatoform disorder not otherwise specified (stress-related physical symptoms); developmental arithmetic disorder (based on significant deficits in numeric skills when compared to same aged peers); and anxiety disorder not otherwise specified. Rodriguez also found the student to be of average intelligence. He recommended mental health counseling to assist her in dealing with her emotional problems and special education classes to remediate her math deficits. Rodriguez' report did not indicate any aggressive behavior on the student's part within the school setting.

12. In contrast to tests utilized by District evaluators, certain tests utilized by Rodriguez in evaluating the student were not versions specifically designed for adolescents (the MMPI); were merely broad screening instruments rather than accurate and accepted diagnostic tools (the Kaufman Brief Intelligence Test and the Wide Range Achievement Test); and/or were old tests utilizing outdated norms (the Wide Range Achievement Test). Thus, to the extent that Rodriguez' results were inconsistent with other testing performed on the student (*e.g.*, his determination that the student's IQ fell in the average range), such results must be disregarded in favor of testing results based on more accurate and up-to-date instruments.

13. Prior to the time of her suspension in December 1995, there is no mention in the student's educational records that the emotional conditions diagnosed by Rodriguez were impacting the student's school performance.

14. During the 1993-94 school year, in addition to academic difficulties, the student had numerous excused absences. She also experienced some disciplinary problems, mainly characterized by an occasionally belligerent or disrespectful attitude toward one of her teachers, resulting in several detentions. She had no out of school suspensions and no expulsions during this time and there is no evidence that she engaged in any violent behavior toward persons while at Freed. There was one incident at Freed in which the student apparently kicked in a glass panel on a door at the school, apparently out of frustration because she was unable to get into the building.

15. During school year 1994-95, the student was a freshman at the District's Centennial High School. In September 1994, a planning conference was held and a 504 Student Accommodation Plan was developed. The conference concluded that the student had a mental impairment which substantially limited her major life activity of learning but did not have a disability under IDEA and did not need special education and related services. The student's disability was described as "slow instructional learning" and accommodations to be provided included concrete learning in sequential steps; manipulative materials for math; extra time for assignments when appropriate; testing prompts; tutoring if appropriate; and short-term counseling "to discuss anger and other issues". (No other reference to "anger" or the reasons for counseling was contained in the September 1994 Section 504 documents concerning the student). No mention was made in this 504 plan of frustration. It was noted that based on testing results the student was achieving at a higher level than her intellectual ability.

16. Despite the development of the 504 plan, the student's academic performance at Centennial was inconsistent. In the fall semester she received three B's, two C's and a D, while in the spring semester she received one B, one C, three D's, and F and a "WF." The student's attendance record indicates she was absent on 56 occasions and tardy 19 times. A number of the absences were excused based on illness and attendance at a due process hearing. During the 1994-95 year the

student had a number of contacts with the Assistant Principal over disciplinary issues, mainly relating to rude conduct toward teachers. This behavior resulted in detention on several occasions, but no suspensions or expulsions. The student also experienced periodic peer problems while at Centennial. However, her difficulties at Centennial involved only verbal misconduct: no physical or violent behavior was involved.

17. The student has a history of being able to get along with some teachers quite well and not being able to get along with other teachers.

18. During the late spring and summer of 1995, the student began using illegal drugs, including occasional experimentation with cocaine and speed and regular use of marijuana, and was out of control at home. The situation remained out of control for a two-month period over the summer, during which time the student frequently would stay out most of the night. On one occasion she disappeared for three days. At the end of the summer the student participated in a drug rehabilitation program. The parties agreed that the student has not used illegal drugs since that time. The evidence indicates that the student's drug usage has ceased and she has no drug problem at this time.

19. In the fall of 1995, as a sophomore, the student attended Pueblo School for the Arts and Sciences ("PSAS"), a charter school within the District. A Section 504 staffing was held concerning the student in September 1995. At this time there was a discussion of the student's drug problem over the summer. D.N. indicated that the staffing team and the District did not need to address this issue because the student was receiving ongoing counseling outside of school and was doing well. D.N. subsequently repeated this information on several occasions to school psychologist Dr. Brian Printz and other District personnel, indicating that the student had no existing drug problem and the District need not be concerned about this issue.

20. During the fall of 1995 the student experienced both academic and disciplinary problems at PSAS. Her grades during the first six weeks included an A, two B's, two C's and a D. During the second six weeks she received two B's, two C's and two F's. In each of these six week periods she received one unsatisfactory citizenship grade. Further, between mid-September and mid-November the student received three disciplinary violations, two involving verbal defiance of authority (refusal to do assignments, profanity in class and verbally confrontational behavior), and one involving possession of cigarettes. As a result of this behavior the student was placed on social probation, requiring study hall attendance after school, and was suspended for two days in lieu of a transfer to another school. The student and her parents were informed that any further violations would result in expulsion.

21. During the fall of 1995 the student was absent from school on a number of occasions. All of these absences were excused.

22. As the fall of 1995 progressed the student became increasingly frustrated over her academic performance, developing a belief that her teachers were either not familiar with or were not following her 504 accommodation plan. This frustration particularly centered around the student's Spanish class and teacher. The student had no interest in taking Spanish and felt that she was being treated unfairly because she was being required to take Spanish II without ever having had Spanish I. (PSAS required all its students to take a foreign language beginning in kindergarten and apparently Spanish I and II were being taught as a combined course). She also came to feel that her Spanish teacher did not like her.

23. During the fall of 1995, D.N. recognized that the student was experiencing increased frustration and became concerned that her behavior both at home and at school was deteriorating and escalating. As a result, she spoke to several of the student's teachers about the student's learning style and inquired into the possibility of convening a staffing with the student's teachers to review her disability and 504 plan. Arrangements were made to convene the staffing in the middle of December.

24. Before the staffing could be held, the student was involved in an incident on December 12, 1995, in which she hit her Spanish teacher. The student and several other students in her Spanish class were talking during class. The Spanish teacher told them to be quiet. The student (according to her, in jest) said to the teacher, "*You* be quiet." The teacher sent her to another room where the teacher later appeared and informed the student she would receive "a violation." The student was aware that because of her accumulated violations, this incident would result in her expulsion from school, which she did not want to happen. The student acknowledged in testimony that she was angry about being expelled for the violation. She then called the teacher a "bitch" and hit her in the face with the back of her hand. Later that day, the student indicated to the police that she had "slapped" the teacher.[3]

25. As a result of this incident, the student was suspended from PSAS on December 12, 1995, for physical assault on a teacher and other detrimental and disruptive misconduct. Her case was then referred to the Administrative Discipline Review Committee of PSAS ("Discipline Committee").

26. At the time of the suspension D.N. was informed orally by District staff that the Discipline Committee would meet and make a recommendation to the District's Board of Education. District staff also orally informed D.N. that an evaluation of the student would be conducted and a determination made as to whether the student's conduct on December 12 which led to her suspension was the result of her disability.

27. The Discipline Committee met on December 13, 1995, and determined that the student be recommended to the Board of Education for expulsion/exclusion from school through the end of the 1995-96 school year.

28. A meeting was held on December 18, 1995, at which D.N. and various District employees were present. During the meeting, school psychologist Dr. Printz reiterated that he would be conducting an evaluation of the student to assist in determining whether there was a link between the student's conduct on December 12, 1995, and her identified 504 disability.

29. On January 2, 1996, D.N. received a letter from the District's Superintendent, Henry C. Roman, formally advising her that the Discipline Committee had recommended expulsion through the end of the school year for violation of Standards 8 and 10, Physical Assault on a Teacher and Other Misconduct Which is Disruptive and Detrimental to Good Order and Discipline in the School. Dr. Roman's letter further advised D.N. that the student's suspension would be extended an additional seven school days, through January 9, 1996, to allow for "the completion of testing" and the holding of a "manifestation hearing" by the Department of Special Education during this period of time. D.N. was invited to contact Martin Gonzales, Executive Director of the Department of Pupil Personnel, with any questions. This letter did not contain any specific date for the manifestation hearing.

30. On January 4, 1996 D.N. requested home-bound instruction for the student until the Board of Education made a decision on the recommendation for expulsion.

31. A staffing was held on January 5, 1996, attended by Martin Quintana, Special Education Coordinator for the District, Dr. Printz, D.N., and the student. At that time D.N. was notified in writing that the expulsion recommendation would be held in abeyance pending an evaluation of the student by a District school psychologist "to determine if [the student's] behavior (assaulting a teacher) is associated to her learning difficulties. Once evaluation is completed a staffing will be held to share information to all appropriate staff." The District agreed at that time to provide home tutoring to the student until the evaluation and staffing had been completed. Also at this meeting D.N. was provided with a document entitled: "Section 504 Student and Parent Rights in Identification, Evaluation and Placement," containing a description of student and parent rights under Section 504. Although this document included information concerning such matters as the right to a free appropriate public education, the rights of parents to receive notice with respect to identification, evaluation of placement of their children, and the right to an impartial due process hearing relating to these issues, it did not contain any specific reference to disciplinary actions against 504 students and did make any reference at all to manifestation hearings.

32. On or about January 2, 1996, D.N. also requested that the District's psychologist evaluate the student to determine if she was eligible for special education for under the Colorado Department of Education guidelines for significant identifiable emotional disability ("SIED"). The District agreed to include this issue in its evaluation.

33. Between approximately January 5, 1966 and January 15, 1996, Dr. Brian Printz, a licensed psychologist and certified school psychologist employed by the District, conducted an evaluation of the student to provide information with respect to the dual issues of determining whether the student's conduct was a manifestation of her identified disability and whether she was eligible for special education under the category of SIED.

34. Dr. Printz has had extensive experience in counseling and assessing adolescents and conducting SIED assessments.

35. Dr. Printz' evaluation involved conducting interviews with the student, D.N., and a private counselor, Pastor Scott Johnson, who had seen the student recently, as well as numerous tests and inventories which Printz administered to the student (Behavior Assessment Scale for Children Self Report; MMPI-Adolescent; Reynolds Adolescent Depression Scale) and additional inventories which Printz administered to D.N. and the student's teachers.[4/] Printz also reviewed the student's PSAS disciplinary file and absentee records, her District disciplinary file, her 504 assessments (including the two prior evaluations conducted by the District in 1992 and 1994), records of a prior due process hearing concerning the question of eligibility for special education, the 1994 report of Dr. Carlos Rodriguez, and an assessment prepared by Pastor Johnson. In the course of his evaluation Printz reviewed the student's prior academic history while at the District, including (but not limited to) a detailed review of her grades at Centennial High School during the 1994-95 school year and her grades at PSAS. In conducting his evaluation Printz considered the student's psychological and emotional condition as well as her social and cultural background and her adaptive behavior and her history of sexual abuse. He also explored the extent to which the student had a history of aggression.

36. In connection with his evaluation, Dr. Printz did not perform any additional IQ testing of the student but instead relied on the WISC-III administered by Finkel in 1994. Reliance on this test was reasonable and appropriate for the following reasons. First, the WISC-III was the most appropriate and accepted instrument for student IQ testing in this context, whereas the IQ test utilized by Dr. Rodriguez in 1994 was unreliable. Thus, it was unnecessary for Dr. Printz to perform additional testing to confirm Dr. Finkel's 1994 results, even in the face of conflicting 1994 results from Dr. Rodriguez. In addition, the test had been administered relatively recently, particularly in view of the fact that the focus of Dr. Printz' evaluation was not the nature of the student's cognitive disability, but whether her actions on December 12, 1995, were a manifestation of her disability and whether

she had emotional disability. Thus, there was no need to perform additional IQ testing under these circumstances for the purpose of updating the 1994 WISC-III results. Further, there was a legitimate concern about over-testing the student both in terms of her self-esteem and obtaining valid results, in view of the number of evaluations she had undergone since 1992.

37. Based on the three self-reporting instruments Dr. Printz administered to the student Printz determined in his report that the student "does not experience a significant amount of depressive symptoms." However, his interviews with the student did suggest that "she may experience a moderate degree of somatic symptoms and some mild symptoms of depression and anxiety" attributable specifically to her removal from school for disciplinary reasons.

38. Among the tests administered by Printz in connection with his evaluation was a Behavior Assessment Scale for Children--Parent, which was given to D.N. This instrument indicated that D.N. perceives her daughter, in comparison to other females her age, to experience significant anxiety, depression and somatic symptoms. D.N.'s responses on this instrument (and her previous reports to the school) did not suggest that the student is aggressive toward others, although in her oral interview with Printz (and at the subsequent manifestation proceeding), D.N. did describe instances of physical aggression by the student in the home. The student, however, indicated to Printz during her evaluation that she had never hit anyone or been in any fights in the past. She noted that typically she keeps anger inside, walks away from situations, or "mouths off" when she is not supposed to. She also did not perceive herself to be significantly depressed. The information supplied to Dr. Printz by the student in this regard was consistent with information received from other school sources and was consistent with the student's actual school behavior and was thus more reliable than information obtained from D.N. with respect to the student's conduct at school.

39. In his evaluation Printz concluded the student was able to differentiate between what are socially appropriate and inappropriate responses and had an adequate sense of what constitutes 'right and wrong' behavior. In addition, he determined that the student had not had difficulty with impulse control since her drug use approximately five months earlier; and that she did not have a history of being physically aggressive toward others in her recent or past history with the exception of the incident of December 12, 1995. Printz also indicated in his evaluation that the student had a history of difficulty developing trusting relationships with many of her teachers and other school personnel, especially since her attendance at PSAS. Based on reports of D.N. and the student, Printz concluded this was primarily due to a combative relationship that had developed between the school and D.N. and the student. This combativeness, in turn, was based on a perception by D.N. and the student that the school was unwilling to adapt for the student's learning difficulties and resulted in a sense of frustration on the part of the student. Printz indicated that this perception may have led to an increase in the student's oppositional and noncompliant approach to adults at PSAS. Printz also indicated in his report that

although the student's prior social history indicated she had experienced emotional trauma during her childhood, her educational record did not contain an indication that these events had significantly impacted her "social, emotional or behavioral functioning at school." Instead, according to Printz, the records indicated that the "focus of the student's educational programming had been tailored around her slow processing style, overall low cognitive skills and low frustration tolerance."

40. Printz initially issued his written evaluation on January 14, 1996. On January 15, 1996, he issued an addendum to the evaluation in which he noted that he had just received telephone call from D.N. reporting to him that within the last week she had learned the student was pregnant. She also reported that the pregnancy was further compounding the student's stress and indicated she was seeking private mental health services for the student. Prior to this conversation, which occurred after Dr. Printz had completed the substance of his evaluation, Printz had received no information indicating the student was pregnant. Therefore, his evaluation of the student did not include any assessment relating to the pregnancy.

41. The inventories given to the student's teachers indicate that in January 1966 when they were filled out most of the student's teachers had concerns about both externalizing (acting out) and internalizing (anxiety, depression) behavior on the part of the student. However, these results were not uniformly true, with two teachers noting the student had only average difficulties in some areas and several teachers noting the student had more than average problems, but not extreme problems. The inventories reflect a snapshot in time and do not provide significant information about long-term perceptions or behavior.

42. The tests and evaluative materials utilized by Dr. Printz in conducting his evaluation of the student assessed all areas of suspected disability and were directed toward resolving the manifestation issue and the issue of the student's eligibility for IDEA.

43. The test instruments utilized by Dr. Printz in his evaluation are recognized and accepted by experts in the field as up-to-date, accurate and appropriate for such an evaluation. In addition, the test instruments utilized by Dr. Printz for directly assessing the student were tests designed specifically for adolescents.

44. There is no evidence in the record that the student suffered from any sensory, manual or speaking impairment or that the result of any test administered to the student by the District was affected in any manner by such an impairment.

45. On January 17, 1996, Printz, Martin Quintana and the District's attorney met with D.N., the student and the student's attorney to distribute and review Printz' evaluation of the student and to answer any questions D.N. might have. Printz explained that the report would be used for the section 504 manifestation staffing and

the special education staffing concerning SIED eligibility. In addition, Printz specifically indicated that there would be two separate meetings: a manifestation staffing, which was scheduled by agreement for January 24, 1996, to deal with the relationship between the student's conduct on December 12, 1995, and her 504 disability, and a special education staffing, scheduled for January 25, 1996, to deal with the student's eligibility for special education. Quintana and Printz explained that two separate proceedings were required because two separate issues were involved. No further written notifications concerning these meetings were provided to D.N.

46. On January 17, 1996, after reviewing Dr. Printz' evaluation, D.N. requested an opportunity to view the actual test questions from the MMPI-Adolescent test instrument administered to the student . In response to this request Printz met with D.N. and her attorney on January 24, 1996, just prior to the manifestation proceeding, to show D.N. the test protocols in question.

47. Both D.N. and her attorney apparently had some confusion as to the exact procedures that would be in place for the manifestation determination. They made inquiries concerning this issue both within the District and elsewhere and were informed that at the staffing on January 24, 1996, a manifestation determination would be made. They subsequently obtained additional information, the substance of which is not clear from the record.

48. At the commencement of the manifestation proceeding on January 24, 1996, Dr. Printz reiterated his previously provided explanation that the staffing for that day would cover the manifestation question, while the staffing on the following day would cover special education eligibility. The evidence indicates that at the time of the January 24, 1996 manifestation staffing the District did not have in place written policies concerning procedures for Section 504 manifestation hearings.

49. D.N. maintained at the hearing and during the course of this review that prior to and during the manifestation proceeding on January 24, 1996, she was confused about the nature of the proceeding and still believed that some additional hearing, rather than just a staffing, would be held on this matter wherein D.N. could have further input. The Administrative Law Judge rejects this assertion and finds, based on the following factors, that prior to the manifestation proceeding on January 24, 1996, D.N. and her attorney were adequately informed of and understood the nature of the proceeding on that day and its finality. Specifically, they were informed that the proceeding on January 24 constituted the student's opportunity to present witnesses, documents and information to the staffing team concerning the manifestation issue.

a. D.N. and her attorney were informed by Printz and Quintana at their meetings on January 5 and 17, 1996, as to the fact and nature of the manifestation hearing.

b. At the commencement of the manifestation proceeding on January 24, 1996, Printz reiterated the purpose of the manifestation staffing and the procedure that would be followed in connection with the staffing. There is no indication that any questions were raised at that time by D.N. or her attorney concerning this explanation.

c. D.N. maintained at the due process hearing that had she realized the January 24, 1966 proceeding was a hearing rather than just a staffing she would have brought in additional witnesses. However, although she was aware at the time of the review hearing that additional witnesses would be permitted to testify, the only additional witness called by D.N. was Dr. Rodriguez, who was called to testify about his post-due process hearing evaluation of the student. The determination not to call additional witnesses at the review hearing to make up for D.N.'s alleged misunderstanding of the nature of the January 24, 1996 proceeding suggests that, in fact, no misunderstanding existed.

d. On January 25, 1996, D.N. made a written statement objecting to the result of the proceedings on January 24 and 25, 1996, in which she stated in part that she believed this was supposed to be "a team decision, not 'us vs. them'. I object to the conclusion that the incident on Dec. 12 was not related to her disability. I object to the decision that she does not qualify for [special education] services." This statement indicates that D.N. understood the nature of these proceedings at the time they were occurring.

50. The January 24, 1996 manifestation proceeding was attended by D.N.; her attorney; Brian Printz; Dr. Sam Pantleo, Dean of PSAS; Martin Quintana, Special Education Specialist and Facilitator of 504 Staffings for the District; Dave Williams, PSAS Counselor; Roberta Wold, PSAS Science Teacher; and Pamela Jacobsen, Special Education Director for the District. The meeting included an assessment of the student's current level of functioning, achievement and performance and a discussion of whether there was any nexus between the student's 504 disability and her behavior on December 12, 1995, including a review of her disciplinary records and the nature of her disability, and a determination of the role of impulsivity in her behavior. The student's psychological and emotional condition, including her history of sexual abuse, her history of drug abuse and recovery, and her pregnancy were discussed and carefully considered in connection with this review, along with her social background and adaptive behavior. D.N. and her attorney were provided an opportunity to participate fully in this proceeding. As a result of this review, school staff determined that was no nexus between the student's misconduct on December 12, 1995, and her Section 504 disability. D.N. and her attorney disagreed with that conclusion.

51. D.N. never received a written notice informing her of the date the manifestation proceeding would be held.

52. On January 25, 1996, a special education eligibility staffing was held to determine if the student qualified for special education as an SIED student. Among those present at that meeting were Martin Quintana; Pamela Jacobsen; Brian Printz; one or more of the student's teachers and counselors; D.N.; the student's attorney; and a friend and advisor to D.N. At the beginning of this meeting it was explained that this was a meeting pursuant IDEA to determine whether the student was eligible for special education under the SIED classification. D.N. and her attorney were provided an opportunity to participate fully in this proceeding.

53. At the IDEA eligibility meeting a Colorado Department of Education form relating to SIED and entitled "Determination of Disability" was discussed and completed. In connection with this discussion the student's psychological and emotional condition as well as her social and cultural background and her adaptive behavior, including her history of sexual abuse, her history of drug abuse and recovery, her pregnancy and her prior school disciplinary history were discussed and carefully considered. Following this discussion school staff determined that the student did not fit within the SIED criteria and was not eligible for special education. D.N. and her attorney disagreed with this determination and at the conclusion of the staffing D.N. filed a written request for an independent evaluation of the student to be paid for by the District. D.N. also indicated in that communication that she disagreed with the determinations that the December 12 incident was not a manifestation of the student's disability and that she was not entitled to special education services.

54. Individuals participating in the January 24 and 25, 1996 manifestation and IDEA eligibility meetings were knowledgeable about the student, the meaning of the evaluation data they were reviewing and the placement options available.

55. On February 2, 1996, the District Special Education Director Pamela Jacobsen, sent a letter to D.N. denying her request for an independent evaluation. The letter asserted that the evaluation conducted by the District complied with all applicable requirements, including those found at 34 C.F.R. §300.532. The District also indicated it was initiating a proceeding pursuant to 34 C.F.R. §§300.503 and 506 to determine the appropriateness of its evaluation. Enclosed with the letter was a copy of Subpart E of the IDEA regulations concerning procedural safeguards, 34 C.F.R. §300.500-542, and a chart comparing the provisions of IDEA, Section 504 and the Americans with Disabilities Act.

56. On February 5, 1996, District Superintendent Henry C. Roman informed D.N. by letter that because the manifestation hearing on January 24, 1996, had determined that the student's conduct on December 12, 1995, was not related to her 504 disability and because the staffing on January 25, 1996, had determined the student did not meet the eligibility criteria to be labeled seriously emotionally disturbed so as to qualify for special education, the previous recommendation of the PSAS Administrative Discipline Review Committee for the student's expulsion until

the end of the school year would be forwarded to the Board of Education for determination on February 13, 1996.

57. On February 12, 1996, the District formally requested the Colorado Department of Education initiate a due process hearing concerning the appropriateness of its decision to deny D.N.'s request for an independent educational evaluation at public expense.

58. On February 15, 1996, D.N. filed a written request for a due process hearing under Section 504, IDEA and the Colorado Exceptional Children's Education Act in relation to the January 24, 1996 manifestation hearing.

59. On February 27, 1996, the School met and determined to expel the student from the school district through the end of the 1995-96 school year, May 29, 1996. The School Board further determined that as a condition of reentry to the District the student would be required to sign a "Contract of Agreement" developed jointly by the receiving school and the District's Department of Personnel outlining expectations for the student's behavior. The Board further determined that one of the criteria would be documentation of professional counseling for the student.

60. In April 1996, the student was referred to Dr. Ronald Smith, a licensed psychologist, for evaluation and therapy. Dr. Smith saw the student on three occasions and diagnosed her as having depressive disorder, anxiety disorder, oppositional/defiant disorder and polysubstance dependence in remission.

61. A local level due process hearing in this matter began on May 1, 1996 and was concluded on May 7, 1996. Matters at issue included the appropriateness of the District's denial of D.N.'s request for at independent evaluation; the appropriateness of procedures utilized in connection with the manifestation hearing; and the correctness of the District's substantive determinations concerning the manifestation issue and the issue of eligibility for special education.

62. At the local level hearing Dr. Printz testified as an expert on behalf of the District essentially consistent with his evaluation. Dr. Smith testified as an expert on behalf of the student, describing his evaluation and diagnosis of the student. In addition, the student's pastor and counselor, Scott Johnson, testified about his contacts and counseling experiences with her. Dr. Smith had not reviewed the reports of Dr. Finkel or Dr. Printz or the results of the MMPI-A administered by Dr. Printz. He thus expressed no opinion as to the adequacy of the evaluations performed by Dr. Finkel and Dr. Printz and indicated that he was not sufficiently familiar with IDEA to render an opinion as to the student's eligibility for special education under the category of SIED or otherwise. Pastor Johnson also expressed no opinion as to any of these issues. Dr. Smith indicated that he would classify approximately 25% of all 17 year-olds as oppositional/defiant at any given time. Dr. Smith indicated that oppositional/defiant behavior in general involves a high degree

of rebellion and lack of cooperation, resulting in serious consequences, but such conduct is less severe than anti-social conduct. He was unable to identify the specific criteria of oppositional/defiant behavior found in the *Diagnostic and Statistical Manual-IV*. Dr. Smith did not indicate that his diagnosis of oppositional/defiant behavior was relevant to a determination of whether the student fit the category of SED (serious emotional disturbance) or SIED (significant identifiable emotional disability). Neither Dr. Smith nor the Pastor Johnson expressed any opinion as to whether the December 12, 1996 incident was a manifestation of the student's 504 disability. No other experts testified on behalf of the student at the local level hearing.

63. The student thus presented no expert testimony at the local level hearing indicating that the District's evaluation in this matter was inappropriate or that the District's manifestation or eligibility decisions were in error.

64. The IHO issued her decision on June 7, 1996, finding in favor of the District on all issues presented.

65. On July 10, 1996, the student and her parents timely filed an appeal in this matter with respect to each issue determined by the IHO, resulting in the current proceeding.

66. On May 23, 1996, Dr. Carlos Rodriguez conducted a psychological evaluation of the student. His written report concerning the evaluation was issued on July 9, 1996. [5]

67. Dr. Rodriguez conducted his May 1996 evaluation of the student in response to a referral he received from Dr. Ronald Smith requesting an intellectual functioning evaluation. Dr. Rodriguez thus limited his evaluation of the student to her intellectual functioning and did not do a formal emotional assessment of the student. His evaluation of the student's intellectual functioning consisted of administering the Wechsler Adult Intelligence Scale/Revised (WAIS-R) and the Wide Range Achievement Test. Based on these assessments Dr. Rodriguez determined the student had an IQ of 78, placing her within the borderline range of 70-79. He also determined that the student had appropriately developed academic skills given her intellectual capabilities. These results were very consistent with the IQ score of 75 obtained by Dr. Finkel in 1994, as well as the achievement test results obtained by Dr. Finkel at that time and the Administrative Law Judge finds them to be accurate, despite the fact that at least one of the instruments used was not necessarily the most accurate or appropriate to use under the circumstances.

68. A state level review hearing was held on September 16, 1996. Dr. Rodriguez testified as an expert on behalf of the student. Dr. Printz testified as an expert on behalf of the District. In addition, Pamela Jacobsen, Director of the Special Education for the District, testified on behalf of the District.

69. In connection with his May 1966 evaluation of the student, Dr. Rodriguez did not have and did not request a copy of Dr. Printz' evaluation of the student, although Dr. Rodriguez testified at the state level review hearing that reviewing the Printz evaluation would have been helpful to him in his own evaluation.

70. In addition to a diagnosis of Borderline Intellectual Functioning, Dr. Rodriguez' May 1996 written evaluation of the student contains a diagnosis of Adjustment Disorder with Mixed Disturbance in Mood and Conduct. Dr. Rodriguez testified that the latter diagnosis was based on the findings of Dr. Smith since Dr. Rodriguez did not perform an independent emotional evaluation of the student. Adjustment disorder is a mild condition which, by definition under the *Diagnostic and Statistical Manual-IV*, is present for six months or less. This condition affects between 5% and 20% of the population at any given time. Adjustment disorder requires the presence of some type of environmental or psycho-social stressors. Rodriguez noted that stressors in the student's life included her pregnancy; the fact that she apparently had been abandoned by her boyfriend and his family after she became pregnant; the school expulsion; and the student's drug recovery. With the exception of the last item, each of these factors apparently originated or became known after the December 12, 1996 incident.

71. Dr. Rodriguez expressed no opinion at the state level review as to whether the student fit within the category of oppositional defiant disorder. Dr Rodriguez also expressed no opinion in the state level review as to whether the District's January 1996 evaluation conducted by Dr. Printz was appropriate, whether the student's December 12, 1995 conduct was a manifestation of her disability or whether the student was eligible for special education based on an emotional disability. No other experts testified on behalf of the student at the state level review.

72. After reviewing Dr. Rodriguez' report, Dr. Printz indicated in his testimony at the state level review hearing that the report did not change Dr. Printz' opinions in any way, including his assessment of the student's emotional functioning.

73. Nothing contained in Dr. Rodriguez' May 1996 report or in his testimony at the state level review hearing was inconsistent with Dr. Finkel's 1994 evaluation or Dr. Printz' 1996 evaluation or with the conclusions reached by District staff at the January 1996 manifestation and special education proceedings.

74. For the most part the testimony of Dr. Rodriguez and Dr. Smith did not contradict the opinions of Dr. Printz. However, to the extend their testimony was in conflict with the testimony of Dr. Printz the Administrative Law Judge finds that Dr. Printz' testimony was more persuasive based on his greater familiarity with psycho-educational testing and assessment techniques; his use of more accurate testing instruments; and his greater familiarity with the evaluation categories and concepts at issue in this case.

75. While Appellant was a student in the District, her diagnosed Section 504 disability has always been her information processing style and auditory retention deficit: she is a slow learner. Thus, the focus of the student's accommodation plans has always been to provide ways to make her schoolwork less burdensome and more manageable, by modification or reduction of assignments with additional time allowed for completion; emphasis on sequential learning; and use of concrete hands-on teaching materials, when appropriate. References in the student's 504 accommodation plans to a low frustration level do not indicate that the student's low frustration level is a disability in itself. Instead, the student's low frustration level is merely a consequence of the student's learning disability and is not an independent handicap. Thus, frustration was dealt with only indirectly in the plans; it was anticipated that easing the student's academic challenge would have the incidental effect of lessening the student's frustration, which in turn would enhance her ability to learn.

76. Although the student's prior social history indicates she had experienced emotional trauma, including sexual abuse, during her childhood, the student's educational records indicate that the focus of the student's educational programming has been tailored around her cognitive difficulties. There is no indication in the student's educational records prior to December 1995, that the student's history of emotional trauma had significantly impacted her social, emotional or behavioral functioning at school.

77. The student's Section 504 accommodation plans do not reflect any concern that the student's cognitive disability or her low frustration level arising from that disability might present a potential for impulsive or out of control behavior.

78. The student's disability did not substantially impair her behavioral controls such that it was difficult or impossible for her to refrain from striking her teacher on December 12, 1995. The evidence also did not establish that incidents of impulsivity prior to December 12, 1995 were related to the student's disability.

79. At the time she struck her Spanish teacher on December 12, 1995, the student knew her conduct was improper and understood the potential consequences of her actions.

80. At the time of the December 12, 1995 incident the student was capable of conforming her conduct to accepted standards.

81. The student's conduct on December 12, 1995, did not bear a direct and substantial relationship to her disability.

82. No causal relationship existed between the student's auditory retention and slow information processing disability and her conduct on December 12, 1995.

83. At its IDEA eligibility meeting on January 25, 1996, the staffing team determined that the student exhibited "an inability to receive reasonable educational benefit from regular education which is not primarily the result of intellectual, sensory, or other health factors, but due to the identified emotional condition." The staffing team also determined that at least in certain circumstances the student also had "an inability to build or maintain interpersonal relationships which significantly interferes with the student's social development." Further, with respect to the SIED definition under Colorado regulations the team also identified the presence of certain indicators of social/emotional dysfunction. These were noted to be: "exhibits pervasive sad affect, depression, and feelings of worthlessness, cries suddenly or frequently (Dr. Rodriguez 1994);" "excessive fear and anxiety;" pervasive opposition, defiant or noncompliant responses (with some individuals);" "significantly limited self-control, including an impaired ability to pay attention (at times);"and "persistent patterns of bizarre and/or exaggerated behavior reactions to routine environments (at home especially since summer, escalating. . .[illegible])."

84. Also in connection with the state SIED regulation, the staffing team noted the presence of two of four required qualifiers, specifically: "indicators of social/emotional dysfunction exist to a marked degree . . .(situational)" and "indicators of social/emotional dysfunction are pervasive, and are observable in at least two different settings within the child's environment, one of which must be school." The school and the parent disagreed about the presence of a third qualifier relating to whether a variety of instructional and/or behavioral interventions had been implemented within regular education without success resulting in the student remaining unable to receive reasonable educational benefit and/or continuing to be detrimental to the education of others. (The parent felt this qualifier had been satisfied while the school did not). Further, the final required qualifier was also determined by the team not to present, specifically: "Indicators of social/emotional dysfunction have existed for a period of time and are not isolated incidents or transient situational responses to the child's environment."

85. The underlying rationale for some of the determinations made by the staffing team on January 25, 1996, and specifically it's conclusions that certain SIED criteria, characteristics and emotional or social functioning elements were present, is not clear from the record.

86. The evidence failed to establish that at the time she was evaluated by Drs. Printz, Smith and Rodriguez the student was suffering from severe depression, severe somatic symptoms or severe anxiety. Instead, the evidence indicates that the student's symptoms in this regard were mild and were in large part a response to transient events, including the student's pregnancy and expulsion from school. To the extent these problems were recurring in nature, they were generally mild rather than severe.

87. The evidence does not establish that the student had a pervasive inability to get along with her teachers or with other students.

88. The student's emotional difficulties were not pervasive (they were often not exhibited across different settings or with throughout each setting); they did not occur over a long period of time and/or with severity (they were transient in nature and/or not marked in degree); they were often situational responses to temporary stressors in the student's environment; and they were not shown to adversely affect the student's educational performance on a long-term basis. Thus, the student currently does not have a serious emotional disturbance ("SED") or a significant identifiable emotional disability ("SIED").

89. Although the evidence at this time does not establish the student currently fits within the SED or SIED categories, if the difficulties the student began experiencing in fall semester 1995 do not abate after the student's return to school following her pregnancy and after any appropriate adjustments in her 504 plan or its implementation, there will then be a need to revisit the issue of the student's emotional status with the perspective of that additional history.

DISCUSSION

I.

JURISDICTION AND STATUTORY BACKGROUND

This case falls under both the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973 (as well as under the state Exceptional Children's Education Act). IDEA requires that states receiving federal grants under the Act must provide each child with a disability with a free appropriate public education ("FAPE"), 20 U.S.C. Sections 1400 *et seq.*, tailored to the unique needs of the child through the establishment of an individualized educational program for such child. 20 U.S.C. Section 1401(20). Under IDEA, a FAPE is defined as special education and related services which are provided at public expense and under public supervision, meet state standards and comply with the child's IEP. 20 U.S.C. Section 1401(18).

In contrast to IDEA, Section 504 of the Rehabilitation Act of 1973 is a civil rights statute that prohibits recipients of federal funds from discriminating on the basis of disability or handicap against otherwise qualified persons. 29 U.S.C. Section 794(a); 34 C.F.R. §104.1; 34 C.F.R. §104.4. With respect to education, it requires that a FAPE be provided for otherwise qualified individuals with disabilities but does not require that qualified individuals receive special education services. Instead, Section 504 and its regulations permit schools to provide a FAPE by means of either regular or special education and related aids and services. 34 C.F.R. §104.33. Section 504 and its regulations further differ from IDEA in that the definition of

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"handicapped person" under Section 504, at 34 C.F.R. §300.104.3, is broader than the definition of "children with disabilities" under IDEA and its regulations, 34 C.F.R. § 300.7. Therefore, Section 504 potentially provides protection for individuals who do not qualify for protection under IDEA.

As a result of the differences in the coverage of IDEA and Section 504, each act governs different aspects of this proceeding. The student in this case has previously been found not to qualify for special education under IDEA pursuant to prior determinations that she did have a disability as defined by IDEA. However, she has been found to be handicapped or to have a disability under Section 504. Therefore, the student has been served by the District under Section 504 by means of Section 504 student accommodation plans. Thus, the issues presented in this hearing relating to the student's currently existing and identified Section 504 disability are governed by applicable provisions of Section 504. These issues include the question of whether the student's action in hitting her teacher on December 12, 1995, was caused (or was a manifestation of) her identified Section 504 disability; and whether the evaluation conducted by the District in connection with this determination complied with Section 504 requirements.

However, this case also involves a request by the student that she be identified as having an emotional disability rendering her eligible under IDEA for special education services. Thus, the issues presented at this hearing relating to the student's eligibility for special education services as having a serious emotional disturbance or a significant identifiable emotional disability are governed by applicable provisions of IDEA.

An additional issue has been presented in this hearing involving the question of whether the student was entitled to an independent evaluation at public expense. Because independent evaluations at public expense are provided for only in connection with the regulations promulgated under IDEA (and then only when the District's evaluation was not appropriate), 34 C.F.R. §300.503, such an evaluation is available only with respect to IDEA issues and only in compliance with IDEA regulations.

II.

MOOTNESS AND RELIEF SOUGHT

Although the issue was not raised by either party, the Administrative Law Judge requested the parties brief the issue of mootness and relief sought by the student in this proceeding particularly with respect to the manifestation question in light of the fact that the student's expulsion had been completed by the time of the state level review hearing and the fact that the student apparently has not sought reinstatement with the District at this time. Appellant responded with the following factual assertions which are not supported by any evidence in the record in this matter: that she was tutored at home in her high school subjects during the second semester of the 1995-96 school year; that the District has refused to give her credit for her work during the second semester because of her expulsion during the second semester; and that she is currently attending high school through the On-Line Academy conducted by Monte Vista High School. Additionally, appellant argued that she may wish to return to the District at a future time and that it is essential to have a correct determination of whether she qualifies for special educational services in order for her education needs to be addressed appropriately. The student further indicated that an independent evaluation might have affected the District's conclusions concerning both the manifestation and special education eligibility issues.

The student asserted she is seeking the following relief: 1) Expungement of the student's record of expulsion; 2) Restoration of the student's credits for the 1995-96 school year; 3) Payment by the District of the expenses incurred by the student for tutoring by Helen Cassidy; and 4) Proper identification of the student as being qualified to receive special education services.

The District did not respond to these assertions in any manner.

The Administrative Law Judge is unable to consider any factual assertions made by appellant which are not included in the record in this matter, either with respect to the issue of mootness or in connection with relief sought. However, based on the student's legal arguments the Administrative Law Judge concludes that no aspects of this matter are moot. Thus, the Administrative Law Judge considers and resolves each of the procedural and substantive raised by the student in her notice of appeal.

III.

PROCEDURAL COMPLIANCE IN CONNECTION WITH LOCAL LEVEL HEARING

Applicable federal regulations at 34 C.F.R. §500.510(b)(2); state regulations at 2220-R-6.03(11)(b)(iv) (1 CCR 301-8) and the State Plan at Part II, A, VII, B, 9, b require the Administrative Law Judge to determine and assure that the procedure at the hearing before the IHO was in accordance with the requirements of due process. The parties agree that the local level hearing procedures complied with the requirements of due process and the Administrative Law Judge's review of the record below confirms that this is the case.

IV.

COMPLIANCE WITH RELEVANT LAW, INCLUDING PROPER PROCEDURES, IN CONNECTION WITH THE MANIFESTATION HEARING

The District seeks to expel the student because she struck her teacher. At the time the student engaged in this conduct she was identified as having a disability under Section 504 of the Rehabilitation Act of 1973. Because expulsion constitutes a "significant change in placement," 34 C.F.R. §104.35(a), the District was required to conduct an evaluation of the student and make a placement determination in accordance with the requirements of 34 C.F.R. §§104.35(b) and (c).[6] Appellant asserts in this appeal that the evaluation conducted by the District and placement determination failed to comply with the requirements of Section 504 (and above-cited regulations promulgated thereunder) in several ways.

Substance of evaluation. The student argues, first, that the evaluation conducted by the District failed to include tests and other evaluation material tailored to assess specific areas of educational need and failed to include an IQ test, as required by 34 C.F.R. §104.35(b)(2). Appellant also argues the tests utilized in the evaluation were not selected and administered so as to best ensure that any impairment of sensory, manual, or speaking skills did not interfere with the measurement of factors which the tests purported to measure, as required by 34 C.F.R. §104.35(b)(3). The student argues further that in interpreting the evaluation data and making placement decisions the District failed to draw upon information relating to the student's physical condition, social and cultural background and adaptive behavior and to establish procedures to ensure that information obtained from such sources is documented and carefully considered, as required by 34 C.F.R. §104.35(c). These arguments are without merit.

The record indicates that the evaluation performed on behalf of the District by Dr. Printz was extremely thorough and properly tailored to address the issues of whether the student's conduct was a manifestation of her identified 504 disability and whether the student was eligible for special education as a result of an emotional disability. Dr. Printz obtained information from a wide variety of sources, including the student, her mother, her counselor, and her teachers. In addition, Dr. Printz reviewed prior disciplinary records, 504 records, records of two previous full psychological evaluations performed the District, as well as the 1994 evaluation of Dr. Rodriguez. Further, as part of his evaluation, Printz administered appropriate testing instruments to the student, her teachers and her mother, and incorporated in his report the student's IQ scores from 1994. The experts who testified on behalf of the student did not take issue with any aspect of Dr. Printz' evaluation and there is no expert evidence in the record that any additional tests or evaluation materials were required. Although the student asserts that specific areas of educational need "presumably should have included the Section 504 disabilities . . . as well as [the student's] high risk pregnancy," appellant presented no expert testimony indicating that the District's evaluation with respect to her Section 504 disability was in any way deficient. Furthermore, the District was not informed of the student's pregnancy until after Dr. Printz' evaluation had been essentially completed and the appellant has failed to indicate how the student's pregnancy represented an educational need for her at the time of the evaluation.

With regard to the specific issue of IQ testing, the record indicates that the 1994 IQ test administered by the District were sufficiently recent that it was neither necessary nor advisable to repeat it. This is true even in light of the contrary result obtained by Dr. Rodriguez in 1994, in view of the unreliability of the instrument Dr. Rodriguez used. Moreover, when further IQ testing was in fact done by Dr. Rodriguez in May of 1996, it proved to be extremely consistent with the 1994 results, thereby underscoring the reliability of the District's 1994 results and the fact the retesting in this area in 1996 was unwarranted and would not have resulted in a different outcome.

Furthermore, despite appellant's implied assertion to the contrary, nothing in 34 C.F.R. §104.35(b)(2) required the District to perform an IQ test on this occasion. The regulation requires that tests and evaluation materials "include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient." The focus of this regulation is not to require IQ tests, but to insure that the tests and evaluations which are performed are tailored to the specific needs and issues of the students involved. The placement issues to be determined in this evaluation related to whether the student's conduct was a manifestation of her known, existing disability and whether she was eligible for special education because of an emotional disability. There was no issue raised as to the student's intellectual capacity. Thus, additional IQ testing was not required at this time, particularly given the fact that such testing had been performed by the District in an appropriate manner within the last two years.

With regard to 34 C.F.R. §104.35(b)(3), which requires the District to select and administer tests to ensure the results are not inappropriately affected by any sensory, manual or speaking impairment, there is no evidence in the record that the student suffered from any such impairment or that the result of any test administered to the student was affected in some manner by such an impairment. Thus, there has been no showing that the provisions of 34 C.F.R. §104.35(b)(3) are applicable to the facts of this case or that such provisions were violated in any manner with respect to the student.

The student additionally argues that in interpreting evaluation data and making placement decisions the District violated 34 C.F.R. §104.35(c) by failing to draw upon information relating to the student's physical condition, social and cultural background and adaptive behavior; by failing to establish procedures to ensure that information obtained from such sources was documented and carefully considered; and by failing to assure that the placement decision was made by persons knowledgeable about the student and the issues involved. The record does not support this claim.

In connection with his evaluation, Dr. Printz interviewed the student, her mother, her teachers and her counselor. His inquiry related to the student's psychological and emotional condition as well as her social background and her adaptive behavior, including her history of sexual abuse, an inquiry into her history of aggression and an inquiry into her prior school disciplinary history. Further, these matters were considered in making placement decisions. In addition, those making placement decisions about the student included persons knowledgeable about the student, the meaning of the evaluation data and the placement options available.

With regard to the requirement of considering the student's physical condition, appellant argues that part of her physical condition was her pregnancy and the fact that she was in substance abuse recovery. According to the student, these factors were not considered by Dr. Printz in his evaluation, despite the fact that both of these conditions "may have had an impact on [the student's] ability to understand and appreciate the consequences and to conform her conduct to standards of right and wrong." Again, the record does not support this claim. Dr. Printz' report did deal with the student's prior drug use and included an assessment of the impact of the student's prior drug usage on her impulsivity. While it is true that the main portion of his report does not mention the student's pregnancy, Dr. Printz was not informed of the pregnancy until January 15, 1996, after he had completed his written evaluation. After learning of the pregnancy Dr. Printz included in his report a January 15, 1996 addendum, memorializing his conversation with D.N. about the student recently learning she was pregnant and including a statement that D.N. was seeking private mental health services for the student.

It is apparent Printz could not consider in his evaluation an aspect of the student's physical condition (the pregnancy) about which he was not informed. However, the record indicates the impact of the pregnancy, as well as the impact of her drug abuse recovery, her psychological/emotional condition and her social and cultural background and her adaptive behavior, were all discussed and carefully considered on both January 24 and 25, 1996, in connection with the manifestation and eligibility determinations made on those days. The fact that the student may not agree with the determinations made after considering these matters does not mean that the requirements of 34 C.F.R. §104.35(c) were ignored or violated.

Procedural Issues. The student asserts that the District failed to follow proper procedures in connection with the manifestation hearing. The Administrative Law Judge disagrees.

Regulations promulgated pursuant to Section 504 of the Rehabilitation Act require school districts, in connection with identification, evaluation or educational placement decisions under the Act, to "establish and implement . . . a system of procedural safeguards that includes notice, an opportunity . . . to examine relevant records, an impartial hearing . . . and a review procedure." 34 C.F.R. §104.36. Further, while specific procedures to implement these requirements are not mandated in the regulations, 34 C.F.R. §104.36 indicates that compliance with IDEA requirements is one way to meet these requirements.

It is undisputed that prior to the manifestation proceeding the District provided to D.N. a written advisement of parental rights under Section 504. However, this advisement did not include any specific reference to a manifestation proceeding or the procedure that would be followed at that proceeding. D.N. also received a January 2, 1996 letter from the District's Superintendent mentioning a manifestation hearing without providing a specific date. In addition, in connection with a January 5, 1996 staffing, D.N. received a written statement indicating that the PSAS expulsion recommendation would be held in abeyance until an evaluation of the student could be performed to determine the manifestation issue. The notice indicated that once the evaluation was completed a staffing would be held to share information to all appropriate staff. This notice further indicated the District's agreement to provide home tutoring to the student until the evaluation and staffing had been completed.

In addition to these written notifications, the record is clear that on at least two occasions prior to the manifestation proceeding both D.N. and the student's attorney received oral notice of the proceeding and how it would be conducted. On one of these occasions D.N. and her attorney met with Martin Quintana and Dr. Printz for the specific purpose of reviewing Dr. Printz' evaluation and answering any questions D.N. might have before the manifestation staffing. In addition, at the commencement of the proceeding, a further oral advisement of the nature of the proceeding was given and neither D.N. nor the student's attorney voiced any objection or concern at that time.

The student claims that because the written procedural safeguards given to D.N. did not outline a procedure different than that in the IDEA, procedures applicable to IDEA matters should have been followed. Thus, according to the student, the procedures specified in 34 C.F.R. §§ 300.504-300.505 (requiring written notice, a full explanation of procedural safeguards, a description of the action proposed, and a written description of all factors of relevance to the proposed action) should have been followed. It is appellant's position that because these procedures were not followed with respect to the manifestation proceeding the District violated procedural requirements of Section 504. Further, D.N. claims that she was harmed by this failure because she remained confused throughout as to the nature and finality of the manifestation proceeding.

The issue raised by appellant is not a trivial one. It is apparent that the intent of the regulations promulgated pursuant to Section 504 is to assure that parents are fully notified about, and have a meaningful opportunity to participate in, educational decisions concerning their children who are covered by Section 504, without imposing upon school districts the detailed procedures mandated by IDEA and its regulations. In this case it is apparent that D.N. received incomplete written information concerning the manifestation proceeding. It is also apparent that it would have been possible for the District to have provided a clearer written explanation of that proceeding. However, the Administrative Law Judge concludes that while the District's written notifications to D.N. were not ideal, when combined with the oral advisements provided to D.N. and the student's attorney, they did not violate controlling regulations and did not substantially interfere with D.N.'s ability to understand the District's procedures or participate in the process of making educational decisions concerning her daughter. [7]

The section of the regulations relied on by Appellant in support of her position, 34 C.F.R. §104.36, requires that the District establish and implement procedures concerning evaluation and educational placement decisions under Section 504. Appellant does not assert that the District failed to establish and implement such procedures, merely that Appellant was not properly informed of them, as required by the rule. The rule in question does not require written notice or any particular form of notice and specifically does not require use of the notice provisions applicable to IDEA. Nevertheless, it is apparent that the notice required must be meaningful: it must provide adequate information to apprise the parent of what educational decisions are being made with regard to his or her child and enable the parent to participate fully in making those decisions. Here, the written notifications provided by the District did not comply with these requirements. However, when the oral notifications provided to D.N. and the student's attorney relating to the date and nature of the manifestation hearing are taken into account, the total notice provided to Appellant in connection with the manifestation hearing complies with the requirements of 34 C.F.R. §104.36. [8]

Furthermore, the record is clear that the District also complied with the aspect of 34 C.F.R. §104.36 which requires the District to provide parents with an opportunity to examine relevant records. D.N. and Appellant's attorney met with Martin Quintana and Dr. Printz a week before the manifestation proceeding. At that time D.N. received a copy of Dr. Printz' evaluation and had an opportunity to review it with him. At that meeting, D.N. requested to see the actual test protocols. Dr. Printz reviewed this material with D.N. before the manifestation proceeding, even though it is not required by law. *Letter to McDonald*, 20 IDELR 1159.

Appellant also suggests that the manifestation proceeding should have been conducted in the first instance as a due process hearing pursuant to 34 C.F.R. §300.506 *et seq.* and that the Dean of PSAS therefore should not have been present during the proceeding. This assertion is without merit. As noted above, 34 C.F.R. §104.35(c) requires that placement decisions be made by a group of individuals, including individuals knowledgeable about the child, the evaluation data and the placement options. A due process hearing would result in an independent hearing officer who had no knowledge of the child making these decisions, contrary to the clear requirement of the rule.

V.
THE CORRECTNESS OF THE MANIFESTATION DECISION

The parties agree that the District is precluded from expelling the student from school if her misconduct was a manifestation of her identified disability. *School Board of the County of Prince William, Virginia v. Malone*, 762 F.2d 1210 (4th Cir. 1985); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom. Honig v. Doe*, 108 S. Ct. 592 (1988). Appellant asserts that the District and the IHO erred in determining that the student's actions on December 12, 1995, in striking her teacher were not a manifestation of her Section 504 disability. The student urges the Administrative Law Judge to adopt an expanded definition of her identified disability and an expansive interpretation of the causal relationship required to be found in order to determine that her actions were indeed a manifestation of her Section 504 disability. The Administrative Law Judge declines to do so.

The Administrative Law Judge has found that the student's disability as indicated in her Section 504 accommodation plans is slow information processing and auditory retention difficulties. Simply stated, she is a slow learner. The student does have a low frustration level which is identified in her school records, but that problem is not a disability in itself. Instead, it is a consequence of the student's slow learning style and is manifested in a tendency to give up on school assignments and tasks that are difficult for her. The 504 accommodations that were designed for the student, including modification or reduction of assignments with additional time allowed for completion; sequential learning; and concrete hands-on teaching materials, all relate to making the student's schoolwork easier and more manageable for her, consistent with her learning style needs. Such adjustments had the additional and concomitant goal of easing the student's level of frustration over her schoolwork and lessening the likelihood that the student would give up on that work because the work would be less difficult for her. However, the disability at issue is the student's slow information processing and difficulty with auditory retention, not her low frustration level.

Thus, the issue to be determined in the first instance is whether the student's disability, defined as difficulties with auditory retention and slow information processing, was the cause of her misconduct. The Administrative Law Judge concludes that no such causal relationship or nexus has been established under the facts of this case.

Conduct is a manifestation of a student's disability if the conduct "arises from," "is caused by" or is related to the disability. *Doe v. Maher*, 793 F.2d at 1480 n. 8. In order to constitute a manifestation of a student's disability such conduct must have a "direct and substantial relationship" to that disability and must "substantially impair the child's behavioral controls." *Doe v. Maher, supra*. Furthermore, although this definition may include conduct of disabled children "who possess the raw capacity to conform their behavior to prescribed standards," it does not include conduct that bears only "an attenuated relationship" to the child's disability. *Doe v. Maher, supra*.

In this case the evidence indicates that the student's misconduct was not caused by, did not arise from and was not related to the student's disability of being a slow learner. The incident at issue involved the student being disciplined for chatting with another student during class. She became angry with the teacher upon realizing this discipline would constitute a third "violation" that would result in her expulsion from school and struck the teacher in the face. At the time of this incident the student knew that her conduct was improper and clearly recognized the potential consequences of her conduct. Furthermore, there evidence indicated that at this time the student was capable of conforming her conduct to prescribed standards and that her disability of being of slow learner did not substantially impair her behavioral controls such that it was difficult or impossible for her to refrain from striking her teacher. Thus, the student's conduct on December 12, 1995, did not bear a direct and substantial relationship to her disability of being a slow learner.

Contrary to the position taken by the District, Appellant argues that her identified problem with frustration was a part of her disability; that this frustration was growing during the fall of 1995 as a result of educational issues at PSAS, in particular her perception that her teachers were not following her 504 plan and her specific frustration with her Spanish class; and that this escalating frustration led to her striking her Spanish teacher. [9] The student also points to her history of improper behavior in previous school years and the evidence of past impulsive behavior on her part, apparently in support of her position that such conduct was not an isolated incident, was indicative of her impaired behavior control, and was related to her disability of having a low frustration level .

This argument is unconvincing. Even if the frustration referred to in the student's 504 plans is considered to be a separate disability (which the Administrative Law Judge believes is not the case), the concern expressed in these plans related solely to the student giving up on her schoolwork because she perceived it to be too difficult. There is virtually nothing in the 504 plans indicating a concern that the student's frustration could result in serious acting out behavior, impulsivity or inability to control behavior or that such behavior, originating from any source, was an issue at all with respect to the student. Thus, the potential for out of control or impulsive behavior was never expressed in the student's 504 plan or perceived by her 504 team as a concern, either as a separate disability or as a potential consequence of her low frustration level arising from her cognitive disability.

Appellant relies on *School Board of the County of Prince William, Virginia v. Malone, supra,* in support of her position that her frustration, which was caused by her disability, led to her misconduct in striking her Spanish teacher and therefore was a manifestation of her disability. The Administrative Law Judge concludes that *Malone* is distinguishable on its facts from the present case and is thus not controlling here. Further, to the extent *Malone* and *Maher* are in conflict, the latter decision is more persuasive and is the one that has been relied upon by the Office of Civil Rights of the U.S. Department of Education, which is responsible for administering Section 504 of the Rehabilitation Act of 1973 with respect to education issues. *See Memorandum from William L. Smith*, Acting Assistant Secretary for Civil Rights, November 13, 1989, 16 EHLR 491(adopting the definition of "caused by" utilized in *Maher* while noting that *Malone* is not helpful in determining the relationship between misconduct and a student's handicap).

In *Malone*, the Fourth Circuit affirmed a District Court's determination that there was a causal relationship between the student's "language processing" learning disability and his participation in drug distribution. It also upheld the District Court's finding that a direct result of the student's learning disability was a loss of self-esteem which made him susceptible to peer pressure, making him a "ready 'stooge' to be set up by peers engaged in drug trafficking." 762 F.2d at 1216. The District Court had noted that although the student probably understood his involvement with drugs was wrong, his learning disability "prevented him from comprehending or giving long-term consideration to the consequences of his actions." In making this determination the Court noted that the student neither used the drugs in question nor received any compensation for his role in the drug distribution, thus suggesting his conduct was the product of a desire to please his peers and an inability to resist peer pressure.

In contrast to the facts in *Malone*, the student in the present case was not affected by peer pressure which prevented her from controlling her own behavior, nor is there any other convincing evidence indicating she was unable to control her behavior, either as a consequence of her identified disability or otherwise. [10] In fact, the student's past behavior was characterized by avoidance of physical confrontations with other individuals. The few prior documented incidents of significantly disruptive or impulsive behavior all involved damage to property; there is no documented evidence of any prior violent behavior directed at individuals in a school setting. [11] Further, the evidence did not show that any past impulsiveness was related to the student's disability. There is also no evidence that the student in this case had a disability which prevented her from comprehending or giving long-term consideration to the consequences of her actions. On the contrary, the evidence (including the student's own statements) supports a determination that the student was well aware of the consequences of all her actions, including her contemporaneous realization that the violation she received for talking in class would result in her expulsion of PSAS.

Furthermore, the Administrative Law Judge finds, as did OCR, that in contrast to *Malone*, the reasoning of *Maher* is of greater assistance and is more persuasive in determining the manifestation issue because the latter case establishes specific tests to be used in making that determination whereas *Malone* does not. It is thus difficult to extrapolate the holding in *Malone* beyond its specific fact situation. The Administrative Law Judge therefore adopts the *Maher* rationale and concludes that under that rationale the student's misconduct was not a manifestation of her disability. Therefore, any decision to expel her based on this conduct would not constitute imposing disciplinary action for conduct over which the student had little or no control.

Having made each of the above determinations, the Administrative Law Judge nevertheless does not agree with the District's apparent position that the incident in question was totally unrelated to the student's disability as a slow learner and her low frustration level in connection with her disability. The mere fact that the student reacted to the imposition of discipline in relation to talking in class rather than responding directly to an "academic" issue hardly proves either that the student was not frustrated by her learning disability or that the frustration was unrelated to academics and schoolwork. It is quite likely in fact that growing frustration with her Spanish class may have contributed to the student not paying attention in class and to becoming angry at her teacher upon being disciplined for her inattentiveness. Nevertheless, the evidence has failed to show that the student, regardless of the source of her frustration, was unable to control her behavior, did not understand the consequences of that behavior or did not understand that her behavior was wrong. Thus, whether or not the student's low frustration level is considered to be a separate disability, the evidence indicates that her conduct bore only an attenuated, rather than a direct and substantial, relationship to her disability. Under these circumstances it would be inappropriate to allow the student's disability to become an excuse for her acting out behavior.

VI.
APPROPRIATENESS OF THE DISTRICT'S EVALUATION

Appellant asserts that she was entitled to an independent evaluation at public expense pursuant to 34 C.F.R.. §300.503 because Dr. Printz' evaluation was inappropriate and failed to comply with 34 C.F.R. §§300.532 (evaluation procedures), specifically 34 C.F.R. §§300.532(3)(b) (failure to perform IQ testing); 300.532(3)(c) (failure to select and administer tests to ensure accurate measurement or to provide adequate notice concerning the nature of this testing at the time the request for independent evaluation was denied); 300.532(3)(b) and (f) (failure to assess the student's pregnancy or drug rehabilitation, particularly as they related to significant identifiable emotional disability or "SIED"); as well as 300.104.35(c) and 300.7(b)(9) (relating to the need to thoroughly assess the student's long-term history). Appellant's argument in this regard is unconvincing.

Pursuant to 34 C.F.R. §503 (pertaining only to IDEA issues and not the Section 504 manifestation issue), the student was entitled to an evaluation at public expense if the District's evaluation, as it relates to IDEA issues, was not "appropriate." Here the District conducted an evaluation (performed by a qualified individual) relating both to the Section 504 manifestation issue and to the student's eligibility for services under IDEA. Following the January 25, 1996 IDEA eligibility staffing, D.N. requested an independent evaluation at public expense. This request was denied on February 2, 1996, in a letter from the District asserting that the evaluation conducted by the District complied with all applicable requirements, including those found at 34 C.F.R. §300.532. The District then initiated a proceeding pursuant to 34 C.F.R. §§300.503 and 506 to determine the appropriateness of its evaluation. (Subsequently, the student also sought a due process hearing concerning the other matters at issue in this case and all the issues were consolidated for hearing at the local level and for this state level review). Following the due process hearing, the IHO determined that the District's evaluation complied with the requirements of 34 C.F.R. §300.532. Thus, by implication, the IHO determined that the evaluation was appropriate and the student was not entitled to an independent evaluation at public expense. For the reasons stated below, the Administrative Law Judge agrees with the result reached by the IHO. [12/]

As a preliminary matter, the student asserts that D.N. "was entitled to notice, in accordance with 34 C.F.R. §300.504-300.505, regarding the denial of her request for an independent evaluation. There is a dispute as to whether the District provided a full explanation of procedural safeguards." It is unclear precisely what notice appellant is asserting was lacking under this general allegation, and the Administrative Law Judge is unable to discern any failure on the part of the District in this regard. The record is clear that the District timely responded in writing to D.N. denying her request for an independent evaluation at public expense. The denial letter stated the District's position that it had fully complied with applicable evaluation requirements and included a summary of those requirements. In addition, the letter noted the District intended to initiate a proceeding pursuant to 34 C.F.R. §300.506 to show that its evaluation was appropriate and enclosed a copy of Subpart E of the IDEA regulations (relating to procedural safeguards). This action appears to have complied with all applicable notice provisions.

Appellant next makes the specific additional assertion, in an apparent reference to §300.505(a)(3), that the District's denial letter failed to describe "each evaluation procedure, test, record or report, upon which the District's denial was based." To the extent Appellant intends to assert the absence of such information in the denial letter constituted a failure to comply with applicable notice requirements, such assertion lacks merit. Simply stated, the controlling regulatory provisions contain no requirement that this precise information be provided. Although the student impliedly asserts that §§300.504 and 300.505 are applicable to this situation, the Administrative Law Judge disagrees. The requirements of those sections are triggered by a proposal or refusal to "initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child," 34 C.F.R. §300.504(a)(1) and (2). In this case, no such action has occurred. There has merely been a denial of a request for an independent evaluation at public expense.

Furthermore, even if those sections were applicable here, any failure by the District to describe the items in question in its denial letter was harmless. It is apparent that at the time D.N. received the denial letter from the District she was well aware of the evaluation procedures and tests upon which the District relied, having previously reviewed Dr. Printz' report and one of the test instruments and having participated in both the manifestation and IDEA eligibility hearings during which these tests, evaluation procedures and reports were discussed in detail.

In connection with substantive aspects of the evaluation, Appellant alleges that the tests upon which the District relied in conducting its evaluation were inadequate and failed to comply with the requirements of 34 C.F.R. §300.532(3)(b) and (3)(c) because no IQ testing was done and there was no evidence that tests were selected and administered so as to ensure that any impairment of sensory, motor and speaking skills did not interfere with an accurate measurement. This issue has already been resolved by the Administrative Law Judge adversely to Appellant in connection with Appellant's argument concerning the alleged defects in the manifestation evaluation and proceeding. (*See* Section IV, *supra*). 34 C.F.R. § §300.532(3)(b) and (3)(c), relied on by Appellant in support of the present argument, are identical to 34 C.F.R. § §300.104.35(b)(2) and (b)(3), upon which Appellant relied in connection with her similar argument concerning the manifestation proceeding. Whether in connection with Section 504 requirements or IDEA requirements, these provisions do not require IQ testing and certainly did not require additional IQ testing under the specific facts of this case. In addition, because there has been no showing that the student suffered from any sensory, motor or speaking impairment, there is no indication that testing of the student had to be adjusted in any manner to account for such impairments. Thus, no violation of 34 C.F.R. § §300.532(3)(b) and (3)(c) have been established.

Appellant also asserts the District's evaluation failed to comply with 34 C.F.R. §300.532(3)(b) and (f) as well as 34 C.F.R. §300.104.35(c) because there was no assessment done pertaining to the student's pregnancy or drug rehabilitation, particularly as they related to SIED, and only limited consideration was given to the student's "longer-term" history, including her history of sexual abuse and depression and her high absenteeism and other educational records from schools prior to PSAS. Appellant asserts that such information should have been considered in light of the above-cited regulations as well as the definition of serious emotional disturbance ("SED") found at 34 C.F.R. §300.7(b)(9) (listing characteristics of SED which must exhibited "over a long period of time"). Appellant's argument in this regard in unpersuasive.

The record does not support the claim that only limited consideration was given to the student's long-term history. As noted, *supra*, in Section IV, Dr. Printz conducted a thorough evaluation, including interviews and testing of the student, her mother, her teachers and her counselor. In accordance with the requirements of §300.104.35(c), this evaluation included an investigation of the student's psychological and emotional condition, her social background and her adaptive behavior, including her history of sexual abuse, an assessment of her depression and emotional functioning, an inquiry into her history of aggression and an inquiry into her prior school academic and disciplinary history. Thus, tests and evaluative materials included those tailored to assess specific areas of educational need, as required by §300.532(3)(b) and the student was assessed in all areas of suspected disability, including social and emotional status and academic performance, as required by §300.532(3)(f).

Although the student asserts that inadequate attention was paid to the student's history of depression, her history of sexual abuse, and her prior school records, the evidence does not support this assertion. Dr. Printz explored the student's depression in discussions with the student, her mother and her counselor and by administering inventories. Based on the three self-reporting instruments Dr. Printz administered to the student he determined that she does not experience a significant amount of depressive symptoms. However, his interviews with the student did suggest that she may experience a moderate degree of somatic symptoms and some mild symptoms of depression and anxiety attributable specifically to her removal from school for disciplinary reasons. In addition, the record establishes Dr. Printz did review the student's prior academic record, including a review of her grades during the last three semesters and a review of her prior evaluations and Section 504 records. Additionally, Dr. Printz considered the student's history of sexual abuse, drawing the conclusion that the student's past history in this regard was not significantly impacting on her functioning at school. Furthermore, Dr. Printz reviewed the student's absentee record at PSAS. Although Dr. Printz apparently did not review the student's absentee record for other schools, the record establishes that her absences at PSAS and Centennial High School, although numerous, were largely excused. Furthermore, Appellant has failed to present any convincing evidence linking any absences Dr. Printz which failed to consider to any determination that Dr. Printz' evaluation was inappropriate.

It is apparent that Appellant's complaints concerning Dr. Printz' lack of attention to her long-term history concerning sexual abuse, depression, absenteeism and school records are actually focused less on his alleged lack of concern for these issues than on the conclusions he drew after considering these matters. In essence, Appellant argues that the evaluation was inappropriate, not because Dr. Printz failed to consider certain issues, but because he failed to accord them the weight Appellant thinks they deserve: he failed to reach the conclusion Appellant wanted him to reach. The Administrative Law Judge rejects this argument. An evaluation is appropriate if it complies with the requirements for evaluations found at 34 C.F.R. § 300.532; it does not become inappropriate merely because a student disagrees with its conclusions. In this case the evaluation was appropriate with respect to consideration of the long-term history issues raised by Appellant and Appellant is therefore not entitled to an independent evaluation at public expense on the basis of this argument.

The record also does not support the claim that the evaluation was inappropriate because there was no assessment performed pertaining to the student's pregnancy or drug rehabilitation. It is apparent that Dr. Printz' report contains only limited references to the pregnancy and the drug abuse issue. However, in light of the surrounding circumstances it was not unreasonable or inappropriate for Dr. Printz to have accorded only minimal attention to these issues.

The record indicates that Dr. Printz was not informed of the student's pregnancy until after he completed his initial report. His discussion of the student's pregnancy in his report is thus limited to a short addendum of January 15, 1966. Furthermore, with regard to the student's drug problem during the summer of 1995, D.N. repeatedly informed District personnel, including Dr. Printz, that the student had received drug treatment and counseling in response to the problem, had not used drugs for several months, and that there were no existing drug issues for the District to be concerned about or involved in. Thus, there was no indication from the student, her mother, or any other source that the student had been involved in anything other than a transitory episode of drug abuse (not uncommon among teenagers) from which the student had totally recovered.

The appropriateness of the District's IDEA evaluation must also measured in relation to the specific concern at issue, which was whether the student qualified for special education services as having a serious emotional disturbance or having a significant identifiable emotional disability. In order to be designated as an SED student, it was necessary to find the student had certain specified emotional difficulties "over a long period of time." 34 C.F.R. §300.7(b)(9). Further, to be designated as an SIED student, it was necessary to find the student's specified social/emotional difficulties had "existed over a period of time" and were not "transitory." 2220-R-2.02(5)(b)(ii) (1 CCR 308-1) (*See infra* Section VII). It is of course apparent that the student's pregnancy was transitory in nature and all available information indicated her drug problem had been similarly short-term in nature and was now resolved. Under these circumstances, Dr. Printz' evaluation of the IDEA issue presented cannot be faulted as inappropriate because of the limited attention he gave to these two short-term conditions.

Finally, Appellant asserts that Dr. Printz' evaluation was inappropriate because Dr. Rodriguez' May 1996 report contained additional information about the student's intellectual and emotional functioning. This argument lacks merit. Dr. Rodriguez' May 1996 report contained no new or conflicting information about the student's intellectual functioning; it was merely confirmatory of information previously obtained by the District and did not affect Dr. Printz' opinion in any manner. With respect to the student's emotional functioning, Dr. Rodriguez' report did indicate a diagnosis of with Adjustment Disorder with Mixed Disturbance in Mood and Conduct. This diagnosis was not based on any assessment performed by Dr. Rodriguez (whose evaluation was limited to the student's intellectual functioning), but instead merely reflected a diagnosis previously made by Dr. Rodney Smith. Further, the diagnosis reflects a relatively minor condition with which Dr. Printz does not disagree and which has no bearing on whether the student is properly classified as SIED. Neither in his report nor in his testimony did Dr. Rodriguez indicate any opinion that Dr. Printz' evaluation was somehow inadequate, incomplete or inappropriate (or wrong). In fact, neither Dr. Rodriguez nor Dr. Smith had ever read Dr. Printz' report. Under these circumstances there is no reason to conclude on the basis of Dr. Rodriguez' report or testimony that Dr. Printz' evaluation was inadequate or inappropriate in any manner.

Because the District's IDEA evaluation of the student as conducted by Dr. Printz was appropriate, the student was not entitled to an independent evaluation at public expense.

VII.

CORRECTNESS OF SPECIAL EDUCATION ELIGIBILITY DETERMINATION

Appellant asserts that both the District and the IHO were incorrect in determining that the student does not qualify for special education services under IDEA as having a serious emotional disturbance or as having an analogous disability under the Colorado classification system, a significant identifiable emotional disability. The Administrative Law Judge disagrees.

IDEA provides that each child with a disability is entitled to a free appropriate public education through the provision of special education and related services. 20 U.S.C. Section 1401 *et seq.* "Serious emotional disturbance" qualifies as a disability under IDEA, 34 C.F.R. §300.7, and is defined at 34 C.F.R. §300.7(9) as:

> (i) . . .a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's education performance--
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers or teachers;
>
> (C) Inappropriate types of behavior or feelings under normal circumstances;
>
> (D) A general pervasive mood of unhappiness or depression; or

> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

Colorado regulations promulgated under the state Exceptional Children's Education Act do not explicitly contain a "serious emotional disturbance" disability category. Instead, the regulations use the alternate term, "significant identifiable emotional disability." Pursuant to state regulations the definition of SIED is quite complex and SIED eligibility determinations are similarly complex. State regulations define SIED as involving "emotional or social functioning which prevents the child from receiving reasonable educational benefit from regular education," 2220-R-2.02(5) (1 CCR 308-1), and then further define "emotional or social functioning," 2220-R-2.02(5)(a). In addition, the regulations include two alternative characteristics of SIED relating to academic functioning and/or social/emotional functioning, 2220-R-2.02(5)(b)(i), and four qualifiers, all of which must be present for either identified characteristic, 2220-R-2.02(5)(b)(ii).

In connection with both the federal SED and state SIED definitions the staffing team apparently determined that at the time of her evaluation the student exhibited both of the characteristics required under Colorado regulations and one or more of the characteristics required under the federal regulations. Further, with respect to the SIED definition under Colorado regulations the team determined the student also exhibited certain indicators of social/emotional dysfunction. Also in connection with the state regulations the team noted the presence of two of the four required qualifiers. (They disputed the presence of a third qualifier and did not find that a fourth qualifier was present).

The basis for some of these determinations is not entirely clear from the record. However, even if accurate, these determinations do not lead to the conclusion that appellant fits within the category of an SED or SIED student. SED is a very severe label, indicating significant and profound emotional difficulties. *See Fauquier County Public Sch.*, 20 IDELR 579 (SEA Va. 1993) ("*Fauquier*"). It is not intended to include temporary or transient emotional conditions or inappropriate responses to temporary situations. Furthermore, in order for an emotional condition to qualify as SED it must adversely affect educational performance. *Fauquier, supra.* This is true even in the face of serious mental illness, as well as grievous or dangerous the misbehavior. *Letter to McNulty*, EHLR 213:108 (OSEP 1987). Thus, the fact that a student has significant behavioral difficulties, including poor impulse control, poor judgment, abusive and profane language, and a refusal to conform her conduct to known requirements, does not establish that the student is SED. *Stanislaus County Office of Education*, 1985-86 EHLR 507:364 (SEA Cal. 1985). Nor does the existence of extreme teenage behavior, difficulties getting along at home, or common delinquent behavior and disciplinary problems, *In re Kristina Louise C.*, 1985-86 EHLR 507:265 (SEA Wash. 1985).

Moreover, individuals who are socially maladjusted are excluded from coverage under the IDEA on the basis of emotional disability unless they are also seriously emotionally disturbed. Thus, the fact that a student is socially maladjusted is not by itself conclusive evidence that the student fits within the definition of SED. *A.E. v. Independent School District No. 25*, 936 F.2d 472 (10th Cir. 1991). Furthermore, where a student demonstrates a struggle with authority, is easily frustrated, and exhibits a persistent pattern of violating societal norms, including truancy, substance abuse, and impulsive and manipulative behavior, such conduct constitutes social maladjustment and not SED. *Sequoia Union High School District*, 1987-88 EHLR DEC. 559:133 (N.D. Cal. 1978). In addition, where a student engaged in fights, became involved in illicit drugs and had lowered grades during the course of a single academic year, such behavior was attributed to poor choices, influenced by transitory situational stressors in his home environment and not to SED. *Pflugerville Independent School District*, 21 IDELR 309 (SEA Tex. 1994).

In the present case the evidence establishes the student does not qualify as SED or SIED. [13/] The student's identified problems for the most part are not longstanding, but are transitory in nature or responses to temporary situations. For example, all the evidence indicates that the student's drug abuse problem existed for a period of several months during the summer of 1995, but had been resolved for some time as of December 1995. Obviously, her pregnancy was also a short-term event. In addition, the student's depression, anxiety and somatic symptoms were apparently a response to transient events, including the student's pregnancy and expulsion from school. In addition, to the extent these problems were recurring in nature, they were generally mild rather than severe. [14/]

Furthermore, there was no evidence, as indicated by the student's educational records and 504 accommodation plans, that the student's emotional problems, including her history of sexual abuse, had significantly impacted her social, emotional or behavioral functioning at school in the past. In fact, it is apparent from those records that these emotional issues had not previously been a focus of concern. In addition, although the student's grades had recently deteriorated, [15/] there was no evidence that the student's emotional concerns had had any longstanding impact on her schoolwork. On the contrary, the student's achievement tests results both in 1994 (as administered by the District) and in May 1996 (as administered by Dr. Rodriguez) establish the student was meeting or exceeding her cognitive functioning levels in all areas.

Other factors relied on by appellant also do not support a determination that the student qualifies as SED or SIED. Although appellant points to the student's aggressive tendencies and impulsivity in support of a designation as SED, the record in fact indicates that the student did not have a history of aggressiveness toward others in the school setting (quite the opposite) and she had not demonstrated a significant degree of impulsivity since her drug abuse in the summer of 1995. Appellant also asserts that the student had a history of being unable establish satisfactory relationships with peers or teachers. Again, however, the record indicates that the student did not demonstrate a pervasive inability to get along with adults in the school setting or an inability to form relationships with other students. Instead, her difficulties with teachers were selective and the record fails to establish a history of being unable to get along with other students. These factors thus do not support a determination that the student has the kind of profound emotional difficulties associated with a designation of SED or SIED, but instead indicate the student's emotional problems, while a significant concern, do not meet the threshold for classification in these categories. [16/]

Significantly, appellant offered no expert testimony that the student was properly classified as SED or SIED. The only expert testimony on this subject came from Dr. Printz, a well-qualified psychologist with special expertise in SIED assessment. It was his opinion that the student did not qualify as having a significant identifiable emotional disability. This opinion is supported by substantial evidence in the record. In addition, nothing in the testimony of the student's experts bolsters the student's assertion that an SED or SIED designation is justified. For example, there was no indication that Dr. Smith's diagnosis of oppositional/defiant behavior (which affects up to 25% of the teenage population at any given time) requires or even suggests a determination of SED or SIED. There was also no indication that the adjustment disorder described by Dr. Rodriguez (a mild condition existing for six months or less and present in 5-20% of the populations at any given time) was impacting on the student's schoolwork in any way (since the stressors giving rise to the condition for the most part originated after the student's suspension). Furthermore, it is apparent that this condition is not sufficiently severe, pervasive or long-term to support an SED or SIED designation.

Thus, the student's emotional difficulties were not pervasive (they were often not exhibited across different settings or with throughout each setting); they did not occur over a long period of time and/or with severity (they were transient in nature and/or not marked in degree); they were often situational responses to temporary stressors in the student's environment; and they were not shown to adversely affect the student's educational performance or to affect it over the long term. Consequently, the student is not eligible for special education as an SED or SIED student. [17/]

CONCLUSIONS OF LAW AND DECISION

1. The Administrative Law Judge has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400

et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794; the Colorado Exceptional Children's Education Act, Sections 22-20-101 *et seq.*, C.R.S. (1995 & 1996); and Part II, Section A, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1995-97.

2. The local level hearing procedures in this matter complied with the requirements of due process.

3. The manifestation proceeding and placement determination conducted by the District on January 24, 1996, and the evaluation of the student performed by the District in preparation for that manifestation proceeding were conducted in compliance with applicable procedural and substantive requirements.

4. The student's conduct resulting in her suspension and expulsion was not a manifestation of her disability.

5. The District's evaluation of the student was appropriate and the student was therefore not entitled to an independent evaluation at public expense.

6. The student does not qualify for special education as an SED or SIED student.

7. This decision of the Administrative Law Judge is the final decision on state level review except that any party has the right to bring a timely civil action in an appropriate court of law, either federal or state. State Plan, Part II, A, VII, B, 10 and 2220-R-6.03(12) (1 CCR 301-8).

DONE AND SIGNED

December 20, 1996

JUDITH F. SCHULMAN
Administrative Law Judge

FOOTNOTES

1/ In addition, the District filed a request for a due process hearing to determine whether the District violated applicable law in denying the parents' request for an independent evaluation at public expense. The District also sought a determination as to whether it correctly decided that the student did not qualify for special education. The due process requests of the parents and the District were consolidated into one proceeding, in which the IHO found against the student and in favor of the District as to all issues raised. The District has not appealed or cross-appealed the IHO's decision.

2/ At an undisclosed earlier time the student received special education services in Topeka, Kansas as a student with identified learning and speech-language disabilities under Kansas guidelines.

3/ The teacher's version of this incident is that it was preceded by a series of rude remarks by the student in class and included personally rude remarks to the teacher after she sent the student out of the classroom. In addition, the teacher stated to police that the student may have used her fist to hit the teacher, but she was not sure. The IHO did not make an explicit determination as to whether the teacher was hit with a fist or an open hand and the Administrative Law Judge concludes that a definitive determination of this issue is unnecessary. For the purposes of this state level review the Administrative Law Judge assumes without deciding that the student's (somewhat less egregious) version of the events in question is accurate.

4/ During the evaluation process D.N. questioned the appropriateness of some of questions on the MMPI-Adolescent test and requested that the remainder of the test not be given. As a consequence, Dr. Printz did not complete the administration of this instrument (but was able to use partial results) and instead substituted another instrument. The evidence indicated that both the MMPI administered to the student and the substituted test were appropriate and acceptable instruments for the assessment Dr. Printz was conducting and that the combination of results from the two instruments provided Dr. Printz with adequate information to complete his assessment.

5/ Dr. Rodriguez' evaluation of the student was not conducted in time to be presented or considered at the local level due process hearing. However, his report and evaluation were presented and considered at the state level review in this matter.

6/ At the request of D.N., the District also evaluated the student to determine whether she was eligible for special education under the category of SIED. Because this aspect of the evaluation involved an IDEA eligibility issue, it is governed by the IDEA and the requirements for such evaluations found at 34 C.F.R. §§300.500 *et seq*. *See* Section VI.

[7] In fact, it is apparent that D.N. did understand the nature of the proceeding and its consequences, as indicated by the written objection to the conclusions of the staffings which D.N. made on January 25, 1996.

[8] The issue is whether Appellant and her attorney received meaningful notice of the fact and nature of the manifestation hearing. The Administrative Law Judge has concluded that, taken as a whole, they did receive such notice. The fact that another type of notice might have been more ideal or the fact that certain other individuals who participated in portions of the proceedings may have been confused about the precise nature of a given day's events does not affect this conclusion.

[9] The parties stipulated that the issue of whether the District was following the student's Section 504 plan was not presented for decision at the local level hearing. This issue was also not raised on state level review.

[10] Although Appellant relies on testimony of Martin Quintana to the effect that the student "possibly" did not understand the consequences of her actions at the exact instant of her misconduct, such reliance is misplaced. The Administrative Law Judge determines that Quintana's comments in this regard amounted to no more than pure speculation and did not outweigh contrary evidence and information contained in the record.

[11] The student's mother reported orally to Dr. Printz in connection with his evaluation of the student that the student had hit family members in the home setting. This information was also reported to the staffing team for the first time on January 24, 1996. The information reported by D.N. to Dr. Printz was inconsistent with information provided by her in written inventories she completed in connection with Dr. Printz' evaluation of the student. In view of the timing and context in which this information was provided, its accuracy is somewhat suspect. In addition, there was no information in the record which would indicate whether such actions in the home setting reasonably could be expected to impact on the student's behavior at school.

[12] In support of her argument concerning the right to an evaluation at public expense, the student has cited at least one federal regulation promulgated under Section 504 of the Rehabilitation Act, in addition to citing regulations promulgated under the IDEA. In fact, however, only IDEA regulations specifically provide for an independent evaluation at public expense. Nevertheless, in view of the dual purpose of the evaluation at issue here (the IDEA eligibility issue and the Section 504 manifestation question), the Administrative Law Judge has considered all cited regulations in determining

whether the District's evaluation was appropriate, despite the fact that the right to an independent evaluation at public expense relates solely to the IDEA issue. 34 C.F.R. §300.503.

13/ Appellant asserts that these two classifications are not identical and that the eligibility criteria for SIED under Colorado regulations are more stringent than the federal SED criteria because the Colorado regulations require a determination that a variety of instructional and/or behavioral interventions have been tried unsuccessfully whereas the federal regulations contain no such provision. Further, although appellant claims she meets the criteria for both classifications, she asserts the District was required to find her eligible for special education because she meets the federal SED eligibility criteria, quite apart from whether she also meets the Colorado SIED criteria. The Administrative Law Judge agrees that the student must be classified as eligible for special education if she meets the federal SED guidelines regardless of whether she qualifies under Colorado SIED guidelines, *see Letter of Thomas Hehir, Director, OSEP*, 22 IDELR 454 (OSEP 1994). However, it is not clear that the Colorado provisions complained of by the student are, in fact, inconsistent with the federal SED regulations, as opposed to merely explanatory. *See Letter of Judy A. Schrag, Director, OSEP*, EHLR 213.249 (OSEP 1989) (noting that states that have defined "long period of time" from the SED regulation typically include a provision "which requires the application of preliminary interventions and documentation of their effectiveness"). Nevertheless, in view of the result reached by the Administrative Law Judge concerning the issue of the student's eligibility under either SED or SIED, there is no need to definitively decide this issue.

14/ Appellant relies heavily on the testimony of D.N. to support the assertion that the student had a long history of severe depression, aggression and anxiety. However, the Administrative Law Judge is persuaded that these conditions were short term, relatively mild and largely in response to transitory situations, including the student's drug abuse problem. The Administrative Law Judge notes that certain information supplied by D.N. is questionable in light of the fact that it never appeared previously in school records and was inconsistent with certain prior statements made by D.N.

15/ Declining grades, even in connection with emotional problems, do not automatically indicate that an SED classification is appropriate. *See Pflugerville Independent School District*, 21 IDELR 309 (SEA Tex. 1994). The recent decline in the student's grades is likely associated at least in part with her short-term frustration over a perceived lack of school compliance with her Section 504 accommodation plan. However, frustration combined with a cognitive disability is not the same as SED.

[16] Appellant also urges reliance on Exhibit 14, the Determination of Disability form completed by the staffing team on January 25, 1996, in support of the assertion that the student should be designated SED or SIED. The Administrative Law Judge declines to accord much weight to that document. There was minimal specific testimony at hearing concerning the basis for some of the team's notations and determinations on the exhibit and the document is not necessarily self-explanatory, either in blank form or as completed by the staffing team. The Administrative Law Judge has therefore relied on the oral testimony presented concerning the student's evaluations and history to make an independent determination of the eligibility question, rather than relying heavily on Exhibit 14 itself.

[17] The fact that the Administrative Law Judge has found that the student is not eligible for special education as an SED or SIED student does not indicate there are no matters left for resolution between the District and appellant outside the purview of this proceeding. It is apparent that at least the student believes compliance with the Section 504 plan is an issue and it is also apparent that there are issues of trust the parties could profitably address. Furthermore, as noted by Dr. Printz, if the problems the student began experiencing in fall semester 1995 do not abate after the student's return to school following her pregnancy and after any appropriate adjustments in her 504 plan or its implementation, there will then be a need to revisit the issue of the student's emotional status with the perspective of that additional history.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to: Melinda Badgley Orendorff, Esq., 409 N. Main, Suite 413, Pueblo, CO 81003 and Jill S. Mattoon, Esq., Peterson & Fonda, P.C., 650 Thatcher Building, P.O. Box 35, Pueblo, CO 81002-0035; via Interoffice Mail to: Myron Swize, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203, on December 20, 1996.

Sally Brown
Secretary to Administrative Law Judge

c/ed9609st.dec

Case No.: **L96:110(a)**

Status: Impartial Hearing Officer Decision

Key Topics: Free Appropriate Public Education (FAPE)
Least Restrictive Environment (LRE)
Individual Education Program (IEP)
Extended School Year (ESY)

Issues:

- Is the Student being provided a FAPE in the Least Restrictive Environment?
- Has the Student been adaquately evaluated as required by applicable law?
- Is the Student's IEP adequate?
- Is the Student's IEP being properly implemented?
- Is the Student being educated in a safe environment?
- Is the Student entitled to an Extended School Year (ESY)?

Decision:

- The student has not been educated in the Least Restrictive Environment. The IHO finds that intensive, personalized reading instruction is an essential component of a FAPE for the student.
- Issue of whether testing was adequate to support initial placement determined to be moot.
- The student's IEP appears marginally adequate to meet legal requirements. A revised IEP should be completed and implemented consistent with the issues from the hearing.
- IHO finds no basis to determine that the teacher in not qualified to provide the necessary instruction with appropriate in-service support.
- Not sufficient evidence to establish the student is in physical danger at her school, or that the educational environment is unsafe, either physically or emotionally.
- The school district shall provide ESY services and the IEP team shall meet the following spring to evaluate the need for ESY for the following summer.

Discussion:

- Implementation
- Safety of the student in the classroom
- Remedies ordered by the IHO

DUE PROCESS HEARING
BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

Case No. L96:110(a)

FINDINGS OF FACT AND DECISION

IN THE MATTER OF THE EDUCATIONAL PLACEMENT OF [redacted]:

[redacted] by and through her mother, [redacted]
Petitioner

and

LAS ANIMAS SCHOOL DISTRICT,
Respondent

A Due Process Hearing in this matter began on May 16, 1996, and concluded on May 20, 1996. The hearing was conducted in LaJunta, Colorado, on the campus of Otero Junior College. The Hearing had been requested by the petitioner.

For reasons of her personal privacy, the petitioner/student will herein be referred to as "the student." The student was represented by her attorney, Melinda Badgley-Orendorff, and by her mother, [redacted] both of whom were present for the entire hearing. The student was not present except when she testified, at the mother's request.

The Respondent school district (School District) was represented throughout the hearing by its attorney, Jill Mattoon, and by Sandra Malouff, Director of Special Education for the School District.

Peggy S. Ball served as Independent Hearing Officer (IHO).

The hearing was open to the public, although witnesses were sequestered. Counsel elected to submit their closing arguments in written form. The Petitioner presented her case first, by stipulation between the parties.

BEST COPY AVAILABLE

BACKGROUND

The Student was born on July 15, 1983, and will be thirteen shortly. She is just completing the 7th grade, and has been in the District for the last two school years, although she was withdrawn to home schooling for most of the second semester of the 6th grade. Before coming to this School District the Student had been in several other districts, and had consistently been identified for Special Education services.

The Student has been identified as eligible for Special Education Services because of perceptual\communicative and speech disabilities. It is undisputed that she has average intelligence, but that her ability to read is severely limited.

The Petitioner requested this Due Process Hearing to address the issues set forth below.

The Hearing was continued to its starting date by stipulation of the parties, with approval of the IHO.

The IHO finds jurisdiction is conferred by 20 U.S.C. §1450; 34 C.F.R. §300, *et.seq.*; and Part VII of the current Colorado Department of Education State Plan.

ISSUES

Petitioner stated the following issues for decision by the IHO (paraphrased):

I. Is the Student being provided a Fair Appropriate Education (FAPE) in the Least Restrictive Environment (LRE)?
II. Has the Student been adequately evaluated as required by applicable law?
III. Is the Student's IEP adequate?
IV. Is the Student's IEP being properly implemented?
V. Is the Student being educated in a safe environment?
VI. Is the Student entitled to an Extended School Year (ESY)?

At the beginning of the Hearing, counsel for the School District moved to dismiss Issue V as being inappropriate for decision. However, the IHO finds there is a minimum level of safety inherent in a FAPE.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Least Restrictive Environment:

Each student is required to be educated in the Least Restrictive Environment applicable to the student and the student's disability. 20 U.S.C. § 1412(5)(b); 34 C.F.R. § 300.552. Greater levels of segregation may be used as a temporary tool to facilitate development of skills conducive to later mainstreaming efforts.

The IHO finds that this Student has not been educated in the Least Restrictive Environment. It is not clear whether this has happened by design of the School District or because the Parent has rejected reasonable mainstreaming alternatives proposed by the

School District. Newly adopted instructional techniques have significantly altered projections for the Student's educational potential.

It is undisputed that the Student has average intelligence. However, until recent efforts were instituted, she has been unable to learn the alphabet or to associate graphemes with their phonemes and blend them into words. There was substantial testimony that the parent, and perhaps one or more teachers, have at times over the years understandably been tempted to give up on trying to teach the Student to read, opting instead for teaching her life skills and adaptive techniques to circumvent her inability to read.

For the last two years, the Student has been in a self-contained Special Education classroom, which has included a Life Skills Program and a Resource Room. The Life Skills Program, which occupies two periods per day and incorporates training in skills such as cooking, sewing, laundering, and recognition of crucial words, is conducted at the high school and includes both middle school and high school students.

During the last semester, the Student was mainstreamed into one core curriculum class, Health, where she has done very well with Resource Room support and some curriculum adaptation. Other than that class, the Student has been mainstreamed only for one or two elective classes per semester. On several occasions, the Student has been removed from such elective classes by her mother.

Diane Kraft testified to the wide variety of causes and educational strategies for dyslexia, and recommended one hour per day of concentrated reading instruction, although she did not recommend any particular method of instruction because she had not personally evaluated the Student.

In January of 1996, the School District retained Ellen Hunter, a learning specialist from Children's Hospital in Denver to perform a partial evaluation of the student and consult with the Parent and other members of the staffing team to develop better strategies for the Student's education. Ms. Hunter testified that the Student was reading on an early first grade level, and had significant difficulty with phonological analysis. She recommended the school focus on direct and explicit reading instruction instead of bypass strategies, and specifically recommended the Lindamood Bell Auditory Discrimination in Depth Program (ADD). She also recommended consideration of the Learning Tool Kit. Ms. Hunter further recommended Extended School Year Services and mainstreaming in content areas. Although she recommended bypass strategies be kept at a minimum, she acknowledged the value of items such as recorded books in content areas to maintain the Student's knowledge in those areas.

Ms. Hunter testified that 30 minutes to an hour of explicit, basic, multisensory phonics instruction daily would have a reasonable likelihood of allowing the Student to eventually become a functional reader. Ms. Hunter felt that the Student had, possibly because she had been in so many different schools and districts, not been given an adequate opportunity to learn to read. Many of the earlier efforts had focused on a sight word approach, which have not been successful with this particular student. Ms. Hunter was firm in her testimony that, although there are numerous theories and treatments for dyslexia on the market, the Explicit Multisensory Phonics approach is the best method for this Student, based upon documented research and results.

Ms. Hunter attended a staffing for the Student in early 1996, and her recommendations were implemented during the second semester of that year. The School District purchased the recommended ADD kit, which was used primarily by the speech therapist, but also was incorporated into reading instruction in the Resource Room.

All of the teachers and experts opined that the ADD approach has resulted in significant improvement in the Student's reading skill level, and all agreed that functional reading capacity appears to be within the Student's capability if proper instruction is given.

The Parent accepted the recommendations of Ellen Hunter, although she was less positive about observed results. The Parent did not think the Student had demonstrably benefitted from the Life Skills class, and was concerned about problems resulting from integration of the Student with older students.

The Special Education teacher, Ms. Spinden, testified that dedicated reading instruction for the Student occurred for only about 15 to 20 minutes per day - with perhaps an extra 5 - 10 minutes a couple of times per week - although reading was also incorporated into other classroom activities.

The IHO finds that neither continued participation is the Life Skills Program nor full-time self-contained classroom placement is consistent with legal requirements for education in the Least Restrictive Environment at this time. The Student has demonstrated her ability to function in some General Education classrooms with appropriate support, and the Life Skills Program does not appear to be reasonably calculated to provide meaningful benefit to this particular student at this time in enhancing later mainstreaming potential. The Student clearly needs focused efforts to develop her reading skills. However, full-time Special Education placement is not warranted, particularly if only 15 to 30 minutes per day is spent in reading skills development.

Fair Appropriate Public Education requires personalized instruction with sufficient support services to permit the handicapped student to benefit educationally from that instruction. **Hendrick Hudson Central School District v. Rowley,** 458 U.S. 176 (1982). Being able to read to a level of functional capacity - estimated to be approximately a 4th to 6th grade level- is an essential element of basic education. Based upon the testimony of Ms. Kraft, Ms. Hunter, and others, the IHO finds that intensive, personalized reading instruction is an essential component of a Fair Appropriate Public Education for this Student, and that the Multisensory Phonics Program approach is a reasonable means of accomplishing this goal and the means most likely to succeed.

Continued Resource Room support is necessary to allow the Student to be successful in General Education classes.

Interestingly, both parties espouse a belief that more General Education mainstreaming is desirable for this Student. Regardless of where the impediments have arisen in the past, the Student will be best served if both parties earnestly strive to accomplish this goal.

II. Evaluation

The parent did not dispute the factual basis for the ADD and Multisensory Phonics Instruction recommendations.

Petitioner's counsel argued in closing argument that the testing which resulted in the Student's original placement in the District was inadequate, and that the Student was placed in an essentially self-contained program primarily because that was where she had been placed in previous districts. A staffing was held within the required time period after acceptance of the transfer placement. The information initially available was augmented later in the year with testing by both Dr. Autry and the School Pschologist.

It is not disputed that the Parent initially requested and preferred placement of the Student in the LifeSkills and Resource Room environments, but Petitioner's counsel argues that the School District had, and breached, a duty to do something more than accede to the Parent's request. The Petitioner does not suggest specific testing which should have been conducted, or indicate what difference it could have made. In light of the decision above that the self-contained placement does not qualify as the LRE for this studetn, this issue of whether testing was adequate to support the initial placement is moot.

The Parent has repeatedly requested a SWAAC evaluation to determine the Student's qualification for assistive technology such as a talking computer, books on tape, and Braille technology. (See, *e.g.*, Exhibit C) The School District initially denied the request and then granted it. The Parent changed her mind, and withdrew the request before the SWAAC team testing was conducted. The Parent then asked the School District to agree to pay for testing by the Easter Seal Society. The School District agreed to do so, but the Easter Seal personnel reportedly declined, stating that the SWAAC evaluation was not what was indicated and an assessment at Children's Hospital would be more appropriate.

Witnesses for the School District testified that the Student's primary teacher, Ms. Spinden, was on the SWAAC evaluation team, that such evaluation was designed for students who were disabled to a level which prohibited communication without special technology, and that much of this technology was already available to the Student through Ms. Spinden. Ms. Spinden testified that the Student has some access to a computer into which Ms. Spinden has loaded content material from the texts used in other classes as part of the Resource Room program, using her personal scanner at home. This computer access with related software and other items available to the Student qualify as "assistive technology devices" within the definitions of the IDEA. Ellen Hunter testified that high technology devices are not what the Student needs. She needs dedicated, specific reading instruction.

With the input from Ellen Hunter, if not before, the educational program for this Student appears to have been adequately personalized and supported to meet legal requirements.

A complete educational evaluation of the Student has been planned for the summer of 1996, at Children's Hospital in Denver. The School District has agreed to pay for the evaluation, with the single stipulation that Children's agree to communicate with the School District to make sure the educators understand the results and recommendations of the evaluation process.

The IHO agrees with experts who testified that educational efforts should focus on teaching the Student to read, rather than on finding ways to circumvent her inability to read. Adaptations of core curriculum materials should be continued as needed to support mainstreamed educational efforts, but a shift to technology which eliminates the need for reading is not appropriate at this time, in light of the opinions of experts who testified at the

Hearing that the Student is capable of becoming a functional reader with identified instructional techniques. If the educational program specified herein is not successful in enabling the Student to read, after a reasonable period of time, then the program can be re-evaluated. However, if functional reading capability is indeed within the Student's reach, then a Fair Appropriate Education would be to try to develop that ability. The scheduled evaluation at Children's Hospital should be more than adequate to correct any inadequacies in earlier testing and identify educational strategies for the Student. This evaluation process will also identify any assistive technology which is needed for the Student's education, and testimony indicated a history of cooperation between the SWAAC team and Children's Hospital. The School District has demonstrated a laudable willingness to work with the staff at Children's Hospital and implement their recommendations. There is no factual basis for a finding that a specific "SWAAC Evaluation" would be reasonably likely to provide information that the Children's Hospital evaluation will not.

Since the evaluation process has already been initiated, and funding has been approved, no further action is required at this time.

III. IEP

The Student's IEP with this District is identified as Exhibits A and 5, with varying attachments. This IEP appears marginally adequate to meet legal requirements, including §300.346 and Section E of the State Plan; 2220-R-3.06, *et.seq.* The annual goals of "Improve reading, math, written language, and skills by one year" are objectively measurable, and incorporate their short term goals. The identified Instructional Objectives for accomplishing such overall goals are too vague, but if the "improve by one year level" is incorporated, measurability is present. However, one would still like to see more specific instructional objectives.

Section 1401(20) (E) requires the staffing team to determine, on at least an annual basis, whether instructional objectives are being achieved.

The parent testified to having attended approximately 7 staffings for the Student during the 1995/96 school year. Each staffing was continued without final resolution in the form of a completed IEP, although adjustments to the previous year's IEP were made on a continuing basis. Testimony indicated that the staffings were continued, most often at the request of the Parent, to obtain further information needed to facilitate consensus.

The October 2, 1995 IEP (Exhibit D) satisfies the requirements for measuring academic progress. Exhibit 3 indicates that goals were established for the 95/96 school year, as of August 31, 1995.

Exhibit 4 was created at the Staffing which was attended by Ms. Helen Hunter from Children's Hospital, on January 9, 1996. This result of this staffing was a recommendation for the ADD program. This IEP is incomplete, primarily in that it does not identify specific instructional objectives in objectively measurable form. It does, however, identify the individualized program of services to be provided. The law requires an annual review of the IEP, but not necessarily a new IEP every year. In light of the fact that the objectives and criteria from the previous IEP had not been achieved, there is some logic to maintaining the objectives in place and altering the instructional plan. However, if one combines all the documents into an integrated, amended IEP, it still is marginally adequate at best.

The Parent testified that her only objection to the present IEP is the need for more General Education classes, and that issue has already been addressed herein.

There clearly is a need for a new IEP to be completed for the 96/97 school year, incorporating this Decision and any new recommendations resulting from the planned evaluation, and specifying short-term instructional objectives reasonably calculated to accomplish identified goals, with particular emphasis on the goal of reading. As a beginning, the ADD and Multisensory Phonics Programs should lend themselves to the development of specific, verifiable short-term objectives.

IV. Implementation

A Fair Appropriate Public Education requires actual execution of the IEP plan, or at least a good faith effort to carry it out, in addition to the mere drafting of the set of documents. Complete success in reaching the goals and objectives of the IEP is not required. § 300.349

The Parent raised concerns regarding whether the Special Education teacher, Ms. Spinden, has been adequately trained to teach the Multisensory Phonics program and to provide adequate Resource Room support to implement mainstreaming accommodations. The Parent raised further concerns as to whether Ms. Spinden has adequate opportunity to provide the planned instruction in the classroom setting to which she is assigned.

Ms. Spinden testified she was spending 15 - 20 minutes per day in specific reading instruction for this Student, with perhaps an additional 5 - 10 minutes a couple of times per week.

The IHO finds no basis to determine that Ms. Spinden is not qualified to provide the necessary instruction with appropriate in-service support. However, the IHO finds that the amount of time dedicated to specific reading instruction has not been adequate to provide a Fair Appropriate Public Education for this Student. Some accommodation must be made to provide more time for specific reading instruction for this Student, as recommended by Ellen Hunter and Diane Kraft. That accommodation might be either a different teacher assigned to teach reading skills to the Student for one period a day or sufficient classroom support which would allow Ms. Spinden to make the time for specific, individualized reading instruction available.

V. Safety

The Parent testified regarding four incidents during the two years the Student had been in the School District, and to a general perception of undue teasing and harassment. The Parent acknowledged that the Student's social adjustment has improved since she has been in a core curriculum general education class and on the track team.

Betsy Schneider, the School Psychologist, testified that she meets with the Student on a regular basis, to help her with the development of positive peer relationships.

The Student testified that she felt she was teased less in general education classes than in special education classes. She also testified that some teachers are better than others at making it clear that abusive behaviors are not tolerated.

The IHO finds that there is not sufficient evidence to establish the Student is in physical danger at her school, or that the educational environment is unsafe for her, either physically or emotionally. It is not clear what program change is being requested by the parent, but as the proponent of such change, the parent has the burden of proof. The School District is encouraged to establish a contact person in the school to whom the Student can contemporaneously report any threats, harassment, or fears. Ms. Schneider could serve that purpose in conjunction with her weekly counseling sessions if she is consistently in the building. The School District is further encouraged to take all reasonable steps to develop sensitivity awareness among students and faculty.

VI. Extended School Year

Although the Parent and the other members of the staffing team recently have met to discuss the possibility of an Extended School Year, no decision has been made. One of the principal concerns is that since the ADD/Multisensory Phonics approach has been so recently started with this Student, substantial ground would be lost if the work were not continued over the summer.

The IHO finds that, based upon the severity of the Student' s reading ability deficit when compared with her intelligence, a Fair Appropriate Public Education for her requires Extended School Year services designed to address her dyslexia in the 1995/96 school year. There is a reasonable basis from the testimony to believe that the ADD and Multisensory Phonics programs are more likely to be successful with this Student if such programs are taught regularly and consistently for at least one year.

The parent has requested a specific summer program at the Learn to Learn Center in Colorado Springs. Dana Windegardner, Assistant Director of the Learn to Learn Center, testified regarding their proposed educational strategies for the Student, based upon her meetings with the parent. Her recommendations included the ADD approach and added a Kinesiology component and other techniques. The experts who testified vehemently disagreed as to whether the added components suggested by the Learn to Learn Center significantly augmented the educational benefit of the ADD and Multisensory Phonics approaches.

The IHO does not find sufficient factual basis for a requirement that Extended School Year Services include the specific services of The Learn to Learn Center.

Ms. Malouff testified that the School District does not object to providing ESY for the continuation of ADD, speech, and Multisensory Phonics for the Student for the 1996 school year.

ORDER

1) FAPE for this Student requires intensive reading instruction, including Multisensory Phonics Instruction, for a minimum of one half hour per school day, on an individual basis, in addition to the ADD program. The IEP should reflect development of functional reading capacity as its primary goal. The IEP should also identify intermediate, verifiable objectives to accomplish this goal, consistently with the Multisensory Phonics Instructional program.

2) Speech therapy is to be continued at the level of not less than four half hour sessions per week, and is to include use of the ADD kit and associated techniques until the team determines that the Student has received the planned benefit from that program.

3) The School District should provide Extended Year Services to the Student during the summer of 1996, to include both 1 and 2 above. In April or May, 1997, the staffing team should meet to evaluate the need for ESY services for that year.

4) Beginning when school starts for the 1995-96 school year, LRE requires this Student to be mainstreamed into general education classes for not less than 50% of her school day, preferably for 5 out of 8 periods. Mainstreaming is to include core curriculum classes, although some electives are also appropriate. The Student, the Parent and other members of the staffing team should meet to discuss the classes which are most beneficial to emphasize the Student's strengths, but specific classes should not be rejected out of hand by any team member for reasons which are secondary to the mainstreaming goal.

4) The remainder of the Student's school day should be spent in a Resource Room type of environment where assistance with general education classes can be provided and disability issues and accommodations can be addressed and managed.

5) A revised IEP should be completed and implemented no later than October 1, 1996, implementing this order.

6) The Student is scheduled for further educational evaluation with Children's Hospital during the summer of 1996. The School District has agreed to pay for whatever portion of such testing is not otherwise covered by insurance or Medicare, with the understanding that Children's Hospital will agree to provide information to the School District, though Ms. Hunter or similar personnel, to ensure that the School District staff fully understands the results and recommendations. No other testing is ordered at this time.

STATEMENT REGARDING RIGHTS OF APPEAL

Either party may obtain state level review of this decision of the IHO. The state level review will be conducted by an Administrative Law Judge of the Colorado Department of Administration, Division of Administrative Hearings.

Any party who seeks to appeal this decision shall file with, or mail to, the Division of Administrative Hearings, The Colorado Department of Education, and all other parties in the proceeding, **within 30 days after receiving this decision**, the following:

1) A Notice of Appeal; and

2) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

Within five days after receiving a Notice of Appeal, any other party may file a cross-appeal.

Further information regarding appeal procedures is attached

DATED: June 6, 1996

Peggy S. Ball

PEGGY S. BALL
IMPARTIAL HEARING OFFICER

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of June, 1996, I deposited a true and correct copy of the foregoing in the United States mail, certified mail, return receipt requested, addressed to the following:

Melinda Badgley-Orendorff, Esq.
490 North Main
Suite 413
Pueblo, Colorado 81003

Jill S. Mattoon, Esq.
Petersen, Fonda, Farley, Mattoon,
Crockenberg and Garcia, P.C.
650 Thatcher Building
P. O. Box 35
Pueblo, Colorado 81003-0035

Chanise A. Tracy

Case No.: **L96:110(b)**

Status: Impartial Hearing Officer Decision

Key Topics: Assessment
IEP

Issues:

- Speech language, vocational and transition needs assessment.
- IEP development

Decision:

- Needs assessment will be conducted
- Student will be identified as a special education student with multiple handicapping conditions, including autism.
- A staffing will be held to develop and IEP
- BOCES and/or school district will arrange for an inservice training

Discussion:

DUE PROCESS HEARING
BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

Case No. L-96:110(b)

JUL 16 1996

FINDINGS OF FACT AND DECISION

IN THE MATTER OF:

[redacted], by and through his parent, [redacted]

Petitioner,

vs.

LAS ANIMAS SCHOOL DISTRICT,

Respondent.

The parties of this matter have agreed to amicably resolve this case according to the Stipulation set forth below, which is incorporated as the Hearing Officer's Decision in this matter.

1. A speech and language, vocational and transition needs assessment, conducted by Dr. Patrick Rydell, is to be completed two weeks or more prior to the start of the 1996/97 school year, paid for by the AVBOCES and/or the Las Animas School District. The petitioner will be responsible for keeping all appointments with Dr. Rydell in a timely manner.

2. [redacted] is to be identified as a SPED student with multiple handicapping conditions, including autism.

3. A staffing will be held to develop an IEP for [redacted] to be completed within two weeks after the start of the 1996/97 school year. Persons present will include [redacted]'s SPED teacher, a school psychologist, Dr. Rydell (and anyone else involved in the evaluation by Dr. Rydell that he believes should be present), representatives of public and other agencies involved in the provision of services to [redacted], including transition, computer training and communication problems. The

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parent will make herself available at reasonable times to attend the staffing prepared to conclude with a finished IEP.

4. The AVBOCES and/or Las Animas School District will arrange for an inservice training to be provided by PEAK Parent Center at the beginning of the 1996/97 school year, to be attended by all LASD teachers, school counselors, school psychologists, speech, occupational and physical therapists, and school nurses. The petitioner will be provided with notification of the dates of training and a list of attendees.

Dated: July 15, 1996

Peggy S. Ball

Peggy S. Ball
Impartial Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of July, 1996, I deposited a true and correct copy of the foregoing in the United States mail, certified mail, return receipt requested, addressed to the following:

Melinda Badgley-Orendorff, Esq.
490 North Main
Suite 413
Pueblo, Colorado 81003

Jill S. Mattoon, Esq.
Petersen, Fonda, Farley, Mattoon,
Crockenberg and Garcia, P.C.
650 Thatcher Building
P. O. Box 35
Pueblo, Colorado 81003-0035

Charise A. Tracy

7. Right to appeal decision of impartial hearing officer.

   a. Either party may obtain state level review of the decision of the impartial hearing officer. The state level review shall be conducted by an Administrative Law Judge of the Colorado Department of Administration, Division of Administrative Hearings.

8. Procedure for appealing decision of impartial hearing officer.

   a. Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

      (1) A notice of appeal; and

      (2) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

   b. Simultaneous with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Colorado Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

      Within five days of receipt of a notice of appeal, any other party may file a cross-appeal.

c. The notice of appeal shall contain the following:

   (1) The caption of the case, including case number and names of all parties.

   (2) The party or parties initiating the appeal.

   (3) A brief description of the nature of the case and the order being appealed.

   (4) A list of the issues to be raised on appeal.

   (5) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

   (6) A certificate of service showing the date the copy of the notice of appeal was mailed to the Colorado Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

d. A notice of cross-appeal shall contain those items listed in VII., B, 8, c, (1) - (4) above along with a certificate of service.

e. At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

f. Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative hearings a designation of any additional portions of the transcript which that party believes are necessary for resolution of the appeal.

g. Whichever party appeals the decision shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

  (1) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record..

  (2) Immediately upon filing any additional designations pursuant to Section VII., B., 8., F. any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

  (3) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parents shall not be required to pay for the cost of a copy of the tape recorded record for an appeal. The transcript or portions thereof shall be made available to any party at reasonable times for inspection or copying at the copiers expense.

g.. Upon receipt of the notice of appeal, the Administrative Law Judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the Administrative Law Judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits, and the decision of the impartial hearing officer.

9. State level review procedures.

a. Unless otherwise ordered by the Administrative Law Judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

b. In conducting a state level review the Administrative Law Judge shall:

(1) Examine the transcript and certified record received from the impartial hearing officer.

(2) Seek or accept additional evidence, if needed.

(3) Afford the parties an opportunity for oral or written argument, or both if appropriate, at a time and place reasonably convenient to the parties.

(4) Determine and assure that the procedure at the hearing before the impartial hearing officer was in accordance with the requirements of due process.

(5) Make a final and independent decision and mail such to all parties within 30 days of the filing or mailing of the notice of appeal.

c. The Administrative Law Judge may grant specific extensions of any of the timelines once a timely appeal has been received at the request of either party.

d. In connection with the state level review, the parties shall have the following rights:

(1) To be accompanied and advised by counsel and by individuals with special knowledge with respect to the problems of children with disabilities.

(2) If further evidence is to be taken, to present evidence and confront, cross-examine, and compel the attendance of witnesses.

(3) To prohibit the introduction of any evidence through witnesses or documents at the hearing if the witness has not been identified or the document has not been disclosed to that party at least five days before the hearing.

(4) To obtain a written or electronic verbatim record of the hearing.

(5) To obtain a written determination upon state level review, including written findings of fact and a decision.

e. In connection with any hearing that is part of the state level review, parents shall have the following additional rights:

(1) To have the child who is the subject of the hearing present.

(2) To open the hearing to the public.

10. Appeal of decision on state level review.

a. A decision made upon a state level review shall be final except that any party has the right to bring a civil action in an appropriate court of law, either federal or state.

11. Attorneys' Fees

a. In any administrative proceeding brought under 20. U.S.C. § 1401, et. seq., or C.R.S. § 22-20-101, et. seq., the impartial hearing officer or the administrative law judge, may not award reasonable attorneys' fees as part of the cost to the parents or guardian of a handicapped child or youth who is the prevailing party. Attorneys' fees shall be sought in the district court and the determination shall be made in accordance with applicable law..

Case No.: **L96:112**

Status: Impartial Hearing Officer Decision

Key Topics:
Least Restrictive Environment (LRE)
Individual Education Plan (IEP)
Related Services
Access to School Records
Confidentiality of Personally Identifiable Information
SIED
Learning Disability

Issues:

- Whether the student is a student with multiple handicaps.
- Whether the district educated the student in the least restrictive environment.
- Whether the district provided the appropriate supplementary aids and services to accomodate the student in the regular classroom.
- Whether the district implemented an appropriate IEP to meet the student's needs.
- Whether the district provided special education and appropriate related services to the student during the time that the student was attending elementary school and after he was withdrawn and home schooled.
- Whether the district provided appropriate accommodations and modifications of curriculum to address the student's educational needs, including a learning disability, fine and gross motor difficulties and the need to provide challenging materials.
- Whether the district provided the mother with reasonable access to the student's school records.
- Whether the district protected the confidentiality of personally identifiable information.

Decision:

- Student cannot be legally classified pursuant to the IDEA as a child with multiple handicaps.
- The district placed the student in the least restrictive environment given his history and behavior.
- The district, after a professional assessment and school personnel input (including Mother), can determine what particular service best meets the student's educational needs.
- The IEP was not in compliance with Federal and State requirements.
- The requirements of the IDEA and its State counterpart do not apply to home-schooled students. A school district does not have to provide a FAPE for a home-schooled child with a disability.
- Not all learning problems are necessarily learning disabilities. The student cannot be considered to have a learning or PC (Perceptual/Communicative) disability under the requirements of IDEA in regard to SIED.
- The district to some degree violated the IDEA when it hindered access to her son's school records.
- The district did not breach any confidentiality requirement.

Discussion:

- The district shall provide the student with counseling services, within 20 of receipt of this decision, by a qualified person who works with SIED individuals.
- The district shall determine the most appropriate delivery system and provide occupational therapy, physical therapy, or adaptive physical education.
- Special education services shall not be required if mother continues to home school the student.
- The district shall hold an IEP meeting to develop an IEP that complies with the requirements under the law.
- The district shall, to the extent appropriate, place the student in an environment in which he is educated with children who do not have disabilities.
- The district shall comply with any request from the mother to review her son's records, without uncessary delay and before any meeting regarding an IEP or hearing. Mother does not have to sign a record of access.

Due Process Hearing No. L96:112

IMPARTIAL HEARING OFFICER DECISION

In the Matter of:

J.R., by and through his parent, C.M.,
Petitioner,

and

PUEBLO SCHOOL DISTRICT # 60,
Respondent.

I.
INTRODUCTORY STATEMENT

A Due Process hearing was held on September 10, 11, 18 and 24, 1996, at the Westminster Presbyterian Church in Pueblo, CO. 20 U.S.C. §§ 1415 et sec. (Individuals with Disabilities Education Act (IDEA)), 34 C.F.R. §§ 300 et sec., and Parts II.B.VII. of the Colorado Department of Education State Plan confer jurisdiction. Attorney Melinda Badgley Ordendorf of Pueblo, CO, represented Petitioner. Attorney Jill S. Mattoon of Peterson, Fonda, Farley, Mattoon, Crockenberg, and Garcia, P.C., of Pueblo, CO, represented the Respondent school District # 60. The hearing was open to the public. Three persons from the public attended portions of the hearing. The Student testified but did not attend the balance of the hearing. Just before adjournment of the hearing, counsel requested and the Hearing Officer established a schedule for written closing arguments.

The Colorado Department of Education received a request for hearing on or about May 23, 1996. The Independent Hearing Officer (HO) did not receive the formal notification until July 30, 1996. A prehearing conference took place on August 21, 1996. The 45 day timeline was extended by agreement of the parties. See the Rules for the

Administration (hereinafter Rules) of the Exceptional Children's Educational Act (ECEA) § 6.03(2); Colorado State Plan, Part II.B.VII.B.4.b.. The HO issued a Case Management Order on August 22, 1996, and the parties provided Case Management Certificates.

II.
ISSUES

The Petitioner identified the following issues in a Case Management Certificate and in a written closing argument:

1. Whether JR (Petitioner and student herein) is a student with multiple handicaps.
2. Whether District 60 educated JR in the least restrictive environment in his neighborhood school.
3. Whether District 60 provided the appropriate supplementary aids and services to accommodate JR in the regular classroom, including but not limited to, reducing the amount of written work, appropriate modifications of curriculum, on-going physical therapy and/or adaptive physical education, and on-going counseling by a school psychologist.
4. Whether District 60 implemented an appropriate Individual Education Plan (IEP) to meet JR's educational needs, including education in the least restrictive environment (LRE) and the provision of related services.
5. Whether District 60 should have provided special education and appropriate related services to JR, including on-going physical therapy and on-going counseling by a school psychologist, during the time that JR was attending elementary school and after he was withdrawn and home schooled.
6. Whether District 60 should have provided appropriate accommodations and modifications of curriculum to address JR's educational needs, including a learning disability, fine and gross motor difficulties and the need to provide challenging materials.
7. Whether District 60 should have provided JR's Mother with reasonable access to JR's school records, including timely access and not requiring Mother to record the occasions when she sought access to JR's records.
8. Whether District 60 should have protected the confidentiality of personally identifiable information and obtained Mother's written consent before disclosing personally identifiable information to a third party.

Relevant statutory and regulatory citations: Colorado School Attendance Law of 1963 § 22-33-104.5(2)(a); C.R.S. §§ 22-20-102, 103(4) and (5.5); § 24-72-203(3); Colorado Rules §§ 2.02, 2.02(1), (4), (5), (6) and (8), 4.05, 4.06, 5.01, 5.02(1), (3) and (4), 5.03, 5.03(2) and (3), 6.01; 34 C.F.R. §§ 300.7(a)(1), 7(b)(6), 7(b)(7), 7(b)(10), 7(b)(11), 8, 16(b)(2) and (b)(8), 17, 121-123, 126, 128, 300, 340, 344, 348, 346, 349, 403, 450-452, 500(a) and (c), 502, 533, 541, 550-552, 560-563, 566 and 571; 20 U.S.C. §§ 1232(g), 1400(c), 1401(a)(1), (15), (16), (17), (18), (20); 1412(1)-(5); 1413(a); 1414(a)(5); 1415; 1417(c).

II.
PRELIMINARY MATTERS

Four witnesses testified for the Petitioner including the Student (JR), the Student's Mother, another student from JR's classroom, and a District school psychologist. Two witnesses testified for the Respondent including the JR's special education teacher and the Special Education Director. Witnesses were sequestered. Petitioner and Respondent admitted forty-five exhibits which are discussed below. Many of the exhibits were lengthy and some were actually documents patched together from different sources. The HO rejected two of Petitioner's exhibits because they were untimely. Petitioner's exhibits are lettered and Respondent's exhibits are numbered. All portions of the due process hearing were tape recorded.

III.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner brought this appeal against District 60 as a recipient of federal funds under the IDEA. It was undisputed that the district is a program participant and receives federal funds for the purpose of providing a free and appropriate public education (FAPE) to eligible students with disabilities under the IDEA. It was undisputed that JR was a student with a disability and therefore eligible for services under the IDEA.

The testimony and exhibits were as follows. JR and his Mother have lived together for some time. (Exhibits 9 and 11) He has no siblings and his parents are divorced. (Exhibits 9 and 11) During the hearing, no Father or other parental figure appeared or was mentioned by any party. (See too Exhibits 9, 10, and 11)

Testimony and exhibits begin with activity in Arizona. JR received a psychological evaluation in Arizona in July, 1994. (Exhibit A) The psychologist reported that JR was somewhat uncoordinated and had difficulty running, although the psychologist's data base was unknown. JR tested very well on verbal functioning, average on arithmetical reasoning, and below average on psychomotor speed. He received a verbal IQ score of 121, a performance IQ of 106, and a full scale IQ of 114. The testing offered "some support" for a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). The psychologist believed that it was JR's "interpersonal style" that caused his educational difficulties. The psychologist who administered the test observed that his findings should be considered only moderately valid, due to JR's defiant style, distractibility, and poor frustration tolerance.

Another Arizona psychologist saw JR again in July, 1994, and recognized that JR was an angry, frustrated and defiant child who would have difficulty succeeding in school unless he obtained the necessary services. (Exhibit 2) The psychologist did not suggest any specific services, but Mother testified that JR saw the psychologist to help JR with math.

JR's Arizona school district conducted an initial referral for evaluation in February, 1995. (Exhibit 3) JR was referred for behavioral difficulties, refusing to do assigned school work, and possibly for an academic difficulty in math (The staffing team placed a question mark next to the word "math."). Mother attended the meeting and reported that JR took medication for possibly Attention Deficit Disorder (ADD). There was anecdotal information that he lagged behind in coordination and performed poorly in sports. Mother reported that JR ran slowly and complained of pain in his legs and feet. He wore arch supports and his arches flattened when he walked. He experienced some psychosomatic problems when under stress. He worked better in small groups, i.e., one or two children. He rebelled against authority figures and became sloppy if he was required to do something that he did not want to do. Mother reported that JR had always been advanced verbally.

An Arizona psychologist administered a supplemental evaluation in April, 1995. (Exhibit B) This psychologist found that JR had learning disability "indicators" with regard to numbers and arithmetic operations as well as attention and social disabilities. The psychologist did not provide the scores or basis for these conclusions. The psychologist noted that JR was on medication: ritalin. The psychologist recommended work on JR's "learning disability," awareness training for his ADHD, and counseling for JR and his mother.

JR obtained his initial elementary school IEP in Arizona in April, 1995. (Exhibit D) He was listed as a 4th grader. The staffing team categorized JR as learning disabled, but there were no criteria, objective or otherwise, provided to document the category. On the Woodcock-Johnson Test of Achievement JR scored at or above grade level in all tested subjects. His highest to lowest range was from 16.9 on word attack to 4.5 on calculation.

JR had academic and cognitive special education needs. (Exhibit D) However, the team did not recommend special education in motor or adaptive physical education. The team did not recommend any related service needs, such as physical therapy or counseling. At a review in May, JR met his goal in reading, spelling, english, and social studies. He did not meet his goal in math and science. His math goal was to average 74% for work completed and JR received a 73%. (JR had however met his short term math objectives over approximately a one month period.) His special education program consisted of a self contained classroom at a regular school in the core subjects plus computer work and independent study. Regular education was not indicated.

JR received a mid-quarter progress report in April, 1995 from his Arizona elementary school. (Exhibit 5) He scored well in reading, spelling, english and math (97% in math). Iowa Test of Basic Skills scores were attached to the progress report. On his Iowa Test of Basic Skills he scored a 98% overall. That is, he scored better than 98% of fourth grade pupils nationally, and his overall achievement was high for his grade. This composite score was the best indicator of overall achievement on the tests. On individual math tests. JR scored 91% on math problems, 79% on math concepts, 31% on math computation, and 78% in math overall.

JR obtained an annual IEP in Arizona in May, 1995. (Exhibit C) JR's grades for the year ranged from above average to failing. He was above average in music, average in spelling, below average in handwriting, and failing in mathematics, language, science, social studies and health. The staffing team again categorized JR as learning disabled. As in Exhibit D, this category appeared to be a non-specific classification since there is no reference to the criteria in either 20 U.S.C. § 1401(A)(15) or 34 C.F.R. § 300.7(b)(10). The team did not indicate any special educational needs, such as motor needs or adaptive physical education. It appears to be an oversight that the team did not mark academic and cognitive special education needs, as they originally had one month before. They did not recommend any related service needs, such as physical therapy or counseling services. JR's special education program was to consist of classes in core subjects at a regular school in a self contained special education classroom as well as regular education with supplementary aids and services.

JR and his Mother moved from Arizona to Colorado sometime in August, 1995. (Exhibit 9)

JR entered the Pueblo School District # 70 (not the Respondent in this case) in the Fall of 1995 and was in the 4th-5th grade. Mother and school personnel placed JR in special service programs based on behavioral difficulties. (Exhibits I and 8) A diagnostic evaluation was anticipated to clarify needs. The exhibit did not discuss any physical disabilities. The conference team noted math, behavior, task completion, and easy frustration as problem areas. It was not clear from the exhibit what the foundation was for these perceptions. JR only attended this school for a week before going to a more restrictive setting.

JR went to Parkview Hospital in early September, 1995, for out-of-control behavior at school. (Exhibit 9) JR had become defiant, aggressive, hyperactive, violent, angry, destructive, distractible and assaultive at school and to some extent at home. He damaged a time out room at school and police brought him to the emergency room, whereupon Mother requested that he be admitted for evaluation. During the intake session with a psychiatrist, JR was placed in time out, became angry, tipped over and pulled a chair. Staff intervened and had to place JR in a seclusion room. During the mental status exam, JR was able to add a penny, nickel and quarter to 31 cents and calculations were fairly good. The psychiatrist noted that JR was "an extremely angry young man" and preliminarily diagnosed JR with depressive disorder, ADHD, and oppositional defiant disorder. (Exhibit 9) The psychiatrist did not record any significant medical history.

During his stay at Parkview, a medical doctor obtained a medical history on JR. (Exhibit 10) The doctor found no remarkable medical history and assessed JR as having attention deficit disorder, probably depressed, and myopic.

A clinical therapist conducted a social history on JR at Parkview. (Exhibit 11) JR had no significant injuries, illnesses or chronic health problems. "Mom and teachers agree that the [school] work is not too difficult for the patient - he just refuses to do it." He has an interest in computers, electronics, science and nature. The therapist felt that Mother was guarded about JR's behaviors. She was rescuing and protective of JR, and excused and minimized his behaviors. Mother was nonetheless willing to work in sessions for her son's progress.

The psychiatrist who conducted the intake assessment on JR also wrote his discharge summary after JR had been at Parkview for six days. (Exhibit 12) The psychiatrist observed that JR presented as coordinated and healthy. He placed JR on two medications. The psychiatrist's final diagnoses was depressive disorder, ADHD, and oppositional disorder. JR was discharged to the day treatment program to work on social skills, self esteem, and frustration tolerance. Day treatment did not work out.

The Colorado Mental Health Institute at Pueblo (CMHIP) admitted JR to its facility in September, 1995, from Parkview for treatment. JR had failed at Parkview day treatment due to severe oppositionality. (Exhibit 21)

CMHIP conducted an education assessment on JR. (Exhibit 14) Although now a 5th grader, JR tested at grade 15 in reading (very superior), grade 6.2 in math (high average), grade 9.2 in written language (superior), and grade 10.9 in knowledge (very superior). The educational recommendation was for JR to be placed in a small classroom, work on behavior control, and receive challenging work. His education would be helped by increased self-esteem, positive socialization with peers and adults, behavior improvement, and increased self-responsibility. These educational goals focused on emotional issues and not on learning disabilities.

The same psychiatrist who conducted the psychiatric assessment at Parkview conducted the assessment at the CMHIP. (Exhibit 17) During the psychiatrist's mental status exam, JR was able to add three quarters and a nickel without difficulty. The psychiatrist noted that JR refused to do school work while at Parkview, although there had been no indication of a specific learning disability. The psychiatrist concluded that in Arizona, staff placed JR in the corner and ignored him. In Colorado, he went to the time out room and this enraged him. In Parkview day care, JR would refuse to talk, then go to time out and become assaultive. On the day of his referral to Parkview, JR spit all over the time out room door, screeched like a monkey, and became infantile. The psychiatrist diagnosed attention deficit disorder, oppositional defiant disorder, and depressive disorder. No acute medical problems or learning disabilities were noted.

A medical doctor completed a history on JR when he was at CMHIP. (Exhibit 20) During the history, JR denied any weakness of his muscles, bones or joints and had a normal range of motion in all extremities. All neurological tests reflected intact nerves. Motor strength was appropriate. The doctor noted no deficits in coordination and JR had a normal tandem gait. JR was not placed on any physical activity restriction.

The CMHIP developed an IEP two months after JR's admission. (Exhibit H) Staff identified JR as Significant Identifiable Emotional Disorder (SIED) and recommended a full special education program with related services and associated therapies. Neither Petitioner nor Respondent contested this SIED designation during the Due Process hearing. At the IEP meeting, Mother noted that JR had a coordination problem. JR scored high average (math) to superior (knowledge, reading and writing) on an academic achievement test. The team noted the previously documented problems with oppositionality and hyperactivity. They also observed poor balance, poor self-awareness, overflow movements effecting writing, poor left/right discrimination, and poor sequencing. Academic needs included visual clues for numbers, one-step directions, and extra time to complete activities. An appropriate anger management group was deemed beneficial.

While at CMHIP, JR received an occupation therapy (OT) assessment. (Exhibit E) The therapist conducted a chart review, interview, and quick neurological screening. He scored at the high end of the normal range in sensory motor skills. Overall, he had "adequate" sensory motor functioning. There were "suspicious" scores in number readiness, vertical eye tracking and sequencing. The therapist believed that JR might benefit from OT. His cognitive skills, especially verbal, were good. He was at the appropriate chronological age in psychosocial skills. The therapist noted, among other things, that JR was easily distracted and impulsive.

JR's CMHIP education summary identified him as SIED. (Exhibit G) The CMHIP professional recommended, among other things, computer class, high average academics, contact with a school psychologist or counselor, a structured environment, removal from frustrating situations, interpersonal skills development, and frequent communication with Mother.

The CMHIP psychiatrist wrote a final summary for JR in November, 1995. (Exhibits F and 21) The psychiatrist observed that JR was bright, but fidgety and impulsive. The psychiatrist's final diagnoses were attention deficit hyperactivity disorder, oppositional defiant disorder, and dysthymia. He noted no medical problems. Prescriptions for clonidine and zoloft were added to JR's ritalin prescription. The psychiatrist recommended continued outpatient treatment.

JR returned to Pueblo School District # 70 and received his transfer IEP in December, 1995. (Exhibit J) The team categorized JR as SIED and physically disabled. His physical impairment was deemed to be associated with balance and required intervention. Of no surprise, JR had high average to very superior academic skills, especially in language, and had above average cognitive ability. Based upon previously obtained data, the staffing team thought that JR was oppositional-defiant, aggressive, assaultive, hostile to authority figures, argumentative, and socially inadequate. He carried an ADHD diagnosis and took three medications.

At the IEP meeting, Mother voiced a concern regarding JR's motor coordination. JR had tested low on a balance and upper limb coordination assessments. (Exhibit K1) He experienced difficulty with catching and certain movements. (Exhibit J)

With regard to his level of functioning, achievement and performance, District 70 was concerned about his math skills and believed that emotional behaviors and organization skills would be academic barriers. JR was nonetheless deemed appropriate for general education in social studies, science, reading, art, and music. Even though this District defined JR as physically disabled, he was recommended for physical education through the general education program. (Exhibit J)

His District 70 special education and related services included a resource room with a special education teacher, counseling for behavior control with the school psychologist, and physical therapy with a therapist. Environment, discipline, and a structured setting were selected as modifications necessary for JR to participate in the general education program. (Exhibit J)

A physical therapist (PT) with District 70 assessed JR in December, 1995. (Exhibit K1) JR scored above his age equivalent in visual motor control as well as upper limb speed and dexterity. He enjoys "physical activities so long as they are within his perceived realm of capabilities." He showed deficits in balance and upper limb coordination with only slight deficits in bilateral coordination. She observed an inefficient gait pattern. The PT did not indicate that he scored below his age equivalent on any test. Nonetheless, the PT determined that he would benefit from movement training or physical therapy to address his motor weaknesses, especially coordination and balance.

JR transferred to another Pueblo elementary school (Respondent District # 60) in December, 1995. Accordingly, an IEP planning conference took place soon thereafter. (Exhibit K2) The purpose of the planning conference was to implement the District 70 IEP. The plan was to place JR in a SIED self-contained classroom and mainstream him as deemed appropriate. However, there were no objective criteria listed in the exhibit to determine when mainstreaming would occur, and the services to be provided were very general in nature. There was no specific service to be provided and the minutes per day of instruction and days per week were left blank. District 60, without explanation in the IEP, removed JR from District 70's plan for psychological counseling and physical therapy.

JR's District 60 special education teacher testified for the Respondent. She described her classroom. She had 11 to 17 kindergarten through 5th grade students in her self-contained SIED "lab." There was also a paraprofessional and a classroom aide. She used positive reinforcement and point sheets to record daily student behavior. These point sheets went home and the teacher testified that she or the paraprofessional filled one out every day for JR. Mother did not agree that the sheets came home every day. The sheets were designed to be reviewed and returned by a parent, but there were times when JR's sheets did not come back.

The room had an easy chair for students to take time out in. JR used the chair about 15 times, but finally used the chair as an excuse to avoid work. For the more severe violators, there was a time out room. The time out room had no ceiling or floor, was partially carpeted, and was approximately 4 feet by 4 feet. The Special Education Director testified that the room had been built to specifications provided by the JR's SIED teacher.

JR spent some of his class day in the SIED lab. The paraprofessional provided one-on-one assistance for JR and others. The teacher wrote individualized lesson plans for JR, and he entered into a goal setting contract with the teacher. Staff gave him extra time to complete assignments, and he was allowed to use the computer to work on assignments. JR could take advantage of weekly group counseling through Spanish Peaks, however he was recurrently removed and finally expelled from the group for oppositional behavior. JR could have engaged in therapy with the school psychologist; however, the teacher placed the burden upon JR to request this service. The lab offered a Student Assistance Program one time per week to work on social skills. The social worker, teacher, and/or counselor ran the group. The teacher taught art in the SIED lab.

The special education teacher had an opportunity to watch JR during physical education. She observed no physical or motor problems. She testified that his gait was acceptable and that he ran satisfactorily. He would chase others around and did not complain of any leg pain. He sometimes would refuse to run, but the refusal did not appear to be medically based. The teacher stated that the perceptual/communicative teacher tested JR for adaptive physical education, but that he did not qualify. Regarding his writing, his teacher testified that it was smooth and neat, and he was a good writer.

A fellow student of JR's testified that they had recess everyday for 30 minutes. During recess, JR sometimes played basketball and football. The student did not remember JR "running around."

The special education teacher testified that JR had behavior problems at school. He avoided or refused to do work, stared off into space, and gave staff dirty looks. When he refused to do school work, she believed that it was not because the work was too difficult. He once ran off and no one could find him. He used obscenities against staff and students. He made lewd gestures and would belittle others. JR was a perfectionist who did not like to ask for help. He became easily frustrated and wanted to control most situations. He was oppositional and defiant. He threatened to kill the SIED teacher and on another occasion threw a desk over. When he first met the science teacher, he said, "Who the fuck are you?" Once when the principal was talking to him, he said, "What the fuck do you care." JR once obtained a medication from a student and was involved in having students ingest the medication. He was suspended from school three times. The teacher spoke with Mother both in person and over the phone about these and other problems.

The special education teacher testified that JR had to go to the time out room for various misbehaviors an average of once per day for from two to ninety minutes. On one occasion, JR damaged the time out room by throwing a chair into it. A board had to be placed over the time out room window to fix the damage. He also wrote on the time out room walls.

The special education teacher used physical restraints on JR on 3 occasions. The Special Education Director testified that the teacher was certified in restraint procedures. Usually, JR would refuse to participate in some activity, become confrontational, escalate, hit and kick, and then be placed in a hold.

JR attended regular education classes while at District 60. JR spent part of a day in regular education for math, reading, social studies, and science. He was also mainstreamed for music, gym, and lunch.

The special education teacher developed individual programs for JR since he was quite bright and had "unaverage" interests. She used part of a gifted and talented program to allow him independent study. She observed that he was helpful with the younger children. He liked to work on the computer, which he did for assignments and as a reward.

The SIED teacher testified that a student in her classroom could graduate from the lab based on input from herself, a therapist, the parent, other associated teachers, and any others who had significant contact with the student. She considered the student's school work and behavior. With regard to JR, no objective criteria were outlined and no date for mainstreaming was confirmed.

The Director of Special Education (Director) testified for the Respondent School District. She disagreed with the Arizona assessments that JR was learning disabled, because JR was bright, at or above grade level, tested well academically, and simply did not attend to his school work. (See e.g., Exhibit 5) She also disagreed with Mother that JR should have the "multiple handicaps" label, since he did not meet eligibility requirements under the state guidelines. That is, she believed that he was not mentally retarded or of significantly limited mental functioning.

To develop JR's District 60 IEP, the Director believed that the District used at least Exhibits 3 (Arizona referral for evaluation), 2 (psychologist's report), 3 (Arizona referral), 8 (District 70 consent for placement), 9 (Parkview psychiatric history), 10 (Parkview medical history), 11 (Parkview social history), 14 (CMHIP educational assessment), 17 (CMHIP psychiatric assessment), 21 (CMHIP discharge summary), A (psychological evaluation), B (psychological addendum), C (Arizona IEP), D (Arizona IEP), and J (District 70 IEP).

The Director was of the opinion that JR was not physically disabled. For example, she noted that no "Physical Disability" box was checked in Exhibit J. The Director found nothing that would indicate a "sustained illness" to justify a physical disability. However, Exhibit J also stated that a "disabling physical condition" could also qualify as a physical disability. (See Exhibit J)

District 70 determined that JR was SIED based on academic and social/emotion functioning. (Exhibit J) That is, District 70 found that JR was unable to receive a reasonable educational benefit from regular education due to his emotional condition. Additionally, he was unable to build or maintain interpersonal relationships which significantly interfered with his social development. Contrary to District 70, the Director did not agree that JR had a problem with academic functioning due to his emotional condition.

The Director testified that the physical education teacher conducted an informal gross motor test and JR did not qualify for adaptive physical education. The test protocol and the test results were not introduced. Further, the physical education teacher had accommodated JR's leg pain complaints by reducing the number of laps that he had to run.

Regarding math, the Director reasoned that if JR really had a math tracking problem, i.e., tracking columns of numbers, then he would also have a problem tracking while reading. There was no indication that he had a reading disability.

The Director disagreed with the school's PC teacher that JR had considerable difficulty with gross motor tasks, such as crossing the kinesthetic midline and maintaining balance. (See Exhibit M) In contrast to the PC teacher, the Director found JR's handwriting to be adequate. (See Exhibits 30, S & T)

The Director reviewed Exhibit K1 (physical therapy report) but found it inadequate because it did not contain test scores. With regard to the number of physical therapists in District 60, she testified that the District was short staffed.

Regarding Mother's access to JR's school records, the Director testified that Mother could look at the special education records if she made a written request. Mother would need to sign a "record of access" if she wanted to look at the records contained within the Pupil Personnel office.

In December, Mother authorized the Child & Adolescent Treatment Center, Parkview Hospital, the Arizona school district, Pueblo School District # 70, and the CMHIP to provide and/or exchange any and "all" information on JR to assist with his educational program planning at District 60. (Exhibit N) Dr. Hardy, a psychiatrist, had worked with at least two of the agencies listed in the releases and had evaluated and treated JR. Dr. Peters, a psychiatrist, had worked with at least one of the agencies listed in the releases and had treated JR.

Regarding JR's records disclosure to others, the Director testified that the school needed a release from the parent to be able to speak with someone about JR.

Upon JR's admission to his new school, his Mother signed a consent for the use of physical restraints. (Exhibit U) The form outlined a four step process for the implementation of a restraint. On at least three occasions, the staff did use physical restraints on JR.

During his tenure with District 60, JR's special education teacher provided him with an alternate activity designed for the gifted and talented student. (Exhibit V) This program was to allow JR to work independently on an advanced activity that the rest of the class was not working on. His special activity was to be a multitask project on the country of Egypt. His teacher testified that he had 4 to 5 weeks to work on the project, but he did not finish it.

He also received daily point sheets on at least the following: December 11-15, 18-20, 1995, January 1-5, 8, 10-11, 16, 24, 31, February 5-9, 12-14, 16, 20-22, 26-29, March 1, 4,-5, and 12, 1996. (Exhibit X) The sheets contained notes as follows: JR rude and disrespectful; not doing work (many); arguing (many); talking (numerous);

interrupting; throwing objects; inappropriate comments (many); disturbing others (several); not participating; refusing to do as requested (often); interfering with others; time outs; out of seat (many); leaving room without permission; running around; staring people down and casting dirty looks; opening and closing door; name calling (many); bad laughing; choosing to not be in group counseling; suspended; tearing up papers; kicked out of music, gym or group counseling; loud; sarcastic; mean remarks; hitting; fighting; cussing; not following directions; making faces; lewd comments and noises; battering time out room door; electing to stay in time out all day; going a.w.o.l. from school; threats; and needed four physical holds.

The February 13, 1996, point sheet states that JR was to begin adaptive P.E. and slowly integrate into regular P.E.

In February, the teacher was not getting the point sheets back and sent home a reminder to Mother.

Petitioner admitted eight pages of written math assignments that included addition, subtraction, multiplication, and division. (Exhibits S and T) JR missed several questions on each exhibit and sometimes did not line up his numbers when adding columns. Every answer on Exhibit T was incorrect. Some pages were unanswered indicating either no effort or a misunderstanding of the concepts. Drawings appeared on some of the pages. During the due process hearing, Petitioner adduced testimony that JR had labored writing. However, review of Exhibits S and T indicate that JR was able to adequately draw question marks, stars, sound waves, geometric shapes, people, circles, feet, shoes, exclamation points, and other diverse shapes. Further, Respondent introduced Exhibit 30, which was a one page hand-written letter from JR. The writing on this letter did not appear strained.

JR testified that his easier subjects were art, science and reading, and that his harder subjects were english and social studies, with the hardest being math. Math made him become frustrated and angry. He testified that the teacher did not interact with him educationally and did not help him with math, particularly Exhibit S. He preferred as much individual attention as possible for academic assistance. He believed that running was uncomfortable for him and indecisively described a pain in his hip that would appear if he did run. He did not take medication for his leg pain. He claimed that he did not fall down or lose his balance when he ran. He related the many incidents when he misbehaved at school and when the police were called. He testified that the Spanish Peaks group counseling at District 60 was unhelpful.

The school suspended JR for one day in January, 1996, for eight behavior infractions. (Exhibit P) In part, he told the principal "screw you" and threw over his desk. The local police were contacted. (Exhibit R) He was again suspended a few days later for behavior problems and profanity. (Exhibit Q) He was suspended again upon his return to school for various behavior problems: he was kicked out of group counseling; refused to go to gym; told classmates to bit his privates; told the teacher he would mangle her face and nail it to the wall; took 1.5 hours to de-escalate; and engaged in a minor assault. (Exhibit R)

An eligibility review meeting took place three months later in March, 1996, to reduce JR's school day to three hours. (Exhibit L) The focus of the meeting was on his emotional difficulties and poor school behavior. Based on previously acquired test results, District 60 repeated that JR possessed high average to very superior academic skills. He was above grade level in reading, knowledge, writing, and math. However emotionally, he was found to be oppositional/defiant, unpredictable, unmotivated, lacking in control, moody, disrespectful, aggressive, assaultive, hostile to authority, argumentative, and unable to use good judgment. He had a difficult time trying to make friends and with interpersonal relationships. He would kick doors, throw over desks, refuse to do school work, and make inappropriate comments. The Respondent District continued to record that JR had ADHD and oppositional-defiant disorder, for which he took medications. No physical or motor problems were noted. No delivery system or service was contemplated or recommended. JR was to be mainstreamed as appropriate, but District 60 gave no timelines or objective criteria to establish or assess his service plan.

The police were called to JR's school on March 4, 1996, due to his misbehavior in class and kicking a teacher. (Exhibit Z) The police issued a summons and complaint for disorderly conduct. (Exhibit BB) On March 5, 1996, JR was uncooperative with staff, refused to do his class work, acted out in group counseling, and was placed in the time out room. (Exhibit W) While in time out, he yelled and screamed. He finally crawled out of the time out room on all fours and barked like a dog. He then chewed up paper and spit paper wads on the teacher and her para-professional. They called the local police. (Exhibit Y) The police issued a summons and complaint for disorderly conduct. (Exhibit AA) Mother testified that the prosecuting city attorney dismissed the disorderly charges.

JR and his Mother attended counseling at Parkview Medical Center in early 1996 with Dr. Peters. (Exhibit CC) Dr. Hardy referred JR to Dr. Peters in January. A note in the report states that the teacher had a signed release to speak with the psychiatrist. JR's teacher contacted JR's therapist at Parkview in March to discuss JR's escalating and "manic" behavior. The teacher also attended a meeting with the therapist and the school social worker. They discussed JR's poor behavior: spitting at and kicking the teacher, putting peers at risk, cussing at teachers, and refusing to do school work. They discussed Mother's apparent ineffectiveness with JR and her minimization of JR's poor behavior. There was concern expressed over whether Mother may have been reinforcing JR's behavior.

Mother felt that these contacts were not permitted by the Exhibit N releases and that school staff sabotaged the treatment relationship between the psychiatrist, mother and JR.

The psychiatrist's notes in Exhibit CC again reiterated that JR suffered from Depressive Disorder, Oppositional Defiant Disorder, and ADHD, and that individual and family therapy were needed. JR's goal was to increase his anger management skills and increase responsible behaviors at school. (Exhibit CC)

In March, Mother removed JR from public school and chose to home school him because she was dissatisfied with District 60 personnel and its special education services.

An additional IEP meeting took place in April, 1996, in part due to JR's behavior when he was in school and to see what services could be provided. (Exhibit M) Mother, the school psychologist, a regular education teacher, JR's special education teacher, a perceptual/communicative teacher, JR, the principal's designee, a school nurse, a physical therapist, the school social worker, and staff from CMHIP attended the meeting. Mother believed that the meeting was for a different purpose: to staff JR out of special education.

A PC teacher with the district found that JR had considerable difficulty with gross motor tasks, crossing the midline, maintaining balance, and fine motor coordination. She concluded that physical impairments could possibly contribute to JR's school frustration and recommended accommodations for his coordination deficiencies.

At the April meeting, the school social worker recounted a day in March when the police had to be called. (Exhibit M) This staff member noted weaknesses in written expression and math, although these were not objectively documented in this exhibit. Numerous behavioral deficits were outlined. She wrote that JR had been previously removed from a psychologist's case load and from physical therapy without the necessary input from professionals and without a proper review of the file. (Exhibit M) However, without any obvious groundwork in the exhibit, the social worker (possibly as secretary for the group) concluded that physical and occupational therapy were not warranted. The school psychologist also testified that the group discussed physical therapy, and that they found that it was unwarranted. The physical therapist nonetheless was to provide consultative services (i.e., for balance, coordination, and written expression) to the physical education teacher, and the PC teacher was to provide services addressing motor weaknesses. Adaptive physical education was suggested.

At any rate, the staffing committee reached no consensus on services for the student since Mother had withdrawn JR from school, and the Special Education Director determined that JR's entitlement to special education services was forfeited. (Exhibits M and DD) The Director testified however that District 60 would provide any additional services that JR qualified for.

Mother wrote a dissenting opinion and stated that her son was not receiving appropriate special education services with regard to physical education, written expression, psychological counseling, and math. (Exhibit M)

Mother testified that JR has motor problems. He is uncoordinated and runs "funny." He saw an orthopedic surgeon in Arizona, wore arch supports, and took ibuprofen for leg pain. In contrast to JR's testimony, she said that he falls down more than other boys. There was a misunderstanding at JR's District 60 school over his participation in physical education.

Mother testified that writing is difficult and frustrating for JR. Testimony and the exhibits did not bear this out.

Mother testified that time out is an appropriate remedy to separate JR from others and allow him time to cool off. She is however convinced that time out in a small room is counter-productive as it merely escalates JR.

Mother signed a physical restraint form and agreed that JR could be restrained under appropriate circumstances. She was aware that he had been restrained three or four times but believes that some of the restraints were unwarranted. She saw one restraint incident, but said that she was not contacted after the others. She would rather see him sit quietly until the difficulty passes. He should not be restrained for a mere refusal to do work, which she believed happened.

Mother acknowledged JR's three suspensions from school and agreed that the police should have been called on at least one occasion. She did not support or oppose the other suspensions.

At one point District 60 placed JR in a regular education class. He refused to do work and the District then removed him from that class. No one from District 60 consulted with Mother when he was removed from the class. The paraprofessional afterwards told Mother than JR was removed from the class because JR refused to do his assignments.

Mother testified that JR needs psychological counseling. She thought that he was attending the District 60 Spanish Peaks group counseling at school, when in fact he had been removed due to his actions without her knowledge.

Mother said that JR took or takes psychotropic medications: ritalin, zoloft, and clonidine. She believed that the medications helped. Mother testified that he had seen a psychiatrist in June and would see the psychiatrist soon after the Due Process Hearing. Exhibits show that he has been in and out of counseling for two years.

Mother discussed various educational problems. She believes that he is poor in math and has difficulty aligning numbers and carrying columns. He is "clueless" when it comes to division. As a result he becomes angry with math work. Generally, as he gets angrier he spirals out of control and will not listen to reason.

He frustrates easily and, until recently, did not ask for help. He will simply refuse to do work. The more that he is pushed, the more obstinate he becomes.

She said that his grades were not good. Testing however indicates that JR could obtain average or better grades. She agrees that he is an advanced reader.

To remedy his academic weaknesses, Mother recommended hands on activities, an emphasis on art, more time to do work, research oriented assignments, individual psychological counseling, increased computer work, less hand-written work, clear one-step directions, removal at the first sign of frustration, one-on-one instruction (especially in difficult subjects), physical therapy or adaptive physical education, course work that matches his academic ability, appropriate placement (i.e., not exclusively in an SIED lab), and mainstreaming. She endorses legal training for District 60 personnel regarding the IDEA and greater District cooperation with the parents of handicapped children.

Mother suggests no running for JR in physical education; however, no aerobic activity of any kind would not be in JR's best interest. Since all agree that he is SIED, JR will more than likely have to be placed during some part of the school day with some emotionally disturbed children. Mother's suggestion that he not be placed with any behavioral problem children appears unrealistic given the testimony and exhibits.

She believes that he has multiple disabilities. He is impaired in non-verbal areas like math, punctuation, work completion, and social skills. She is of the opinion that JR's label of SIED standing alone is incorrect and that he also suffers from a learning disability and a physical impairment.

During JR's attendance in Respondent's school, Mother tried to obtain her son's school records. She testified that she went to his elementary school, District 60 offices, the Director of Pupil Personnel's office, and the Director of Special Education's office. She testified that on one occasion she was only allowed to look at the records if she signed a "record of access," and the Director of Pupil Personnel was present. She was unable to get copies. On one appointment, she made a list of what she wanted and gave it to the District, but no one contacted her. The Special Education Director testified that Mother could obtain records if Mother made a written request.

The school psychologist testified about her limited contact with JR and Mother, and District 60's special education procedures and services. She did not treat JR, but came to the school one time per week for about one hour. She was there to assist staff and to run a group session. JR may have attended the group.

According to the psychologist, the SIED lab used the time out room for students who were physically aggressive or who might hurt themselves. "Time out" could consist simply in having a student sit in a chair. If a student was to refuse to do work, a solution might be to positively reinforce others around the obstinate student or to administer some type of token system for completed work

According to the psychologist, the physical restraint procedure ideally employed two people and was designed to help the child get under control. Restraint would be used in time out if the student were hurting himself.

The school psychologist attended the April, 1996, review meeting. She understood the purpose of the meeting to decide if JR could come back to school and how best to accomplish this goal. When JR was in District 60 she provided JR with no individual psychological counseling, although she believed that it could have been done. The meeting group discussed JR's "learning disability," particularly the PC teacher. The psychologist said that the PC teacher naturally focused on JR's learning disability rather than his emotional disorder.

The psychologist testified that the police are called for Type I and II behaviors, and the police were called on students other than JR. (See Exhibit P for a listing of Type & II behaviors.)

The Director of Pupil Personnel wrote Mother in April, 1996, about home schooling. (Exhibit EE) The letter explained the required educational evaluations that would take place and JR's option to take selected classes in District 60. JR has been in home schooling since that time.

IV.
DISCUSSION

The purpose of the IDEA is to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents are protected, to assist school districts to provide for the education of all children with disabilities, and to assure the effectiveness of efforts to educate children with disabilities. 20 U.S.C. § 1400(c).

"Special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including: (1) instruction conducted in the classroom, in the home, and in other settings; and (2) instruction in physical education. 20 U.S.C. § 1401(a)(16); 34 C.F.R. § 300.17(a)(1).

"Related services" mean corrective and supportive services as may be required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(a)(17). This includes psychological services, physical and occupational therapy, and counseling services. 34 C.F.R. § 300.16(a).

1. INTRODUCTION

JR

JR is an intelligent and articulate young man. When the subject is one that he is interested in discussing, then he is open and expressive. However, if the subject is critical or painful for him, then he tends to say less and avoid discussion. Indeed, he testified that he did not like to talk about himself. He did acknowledge that he had been in individual therapy and that it was helpful to talk to therapists about his behavior. He also believed that medication was helpful to control his behavior.

JR's testimony was to some extent suspect. He had good recall of details if it was to his benefit, but adopted broad brush strokes and poor recall when pressed as to details that were not to his benefit. He tended to minimize his description of the times that he misbehaved in school. He saw himself as more of a nuisance than as the difficult student that he really was. Given his above average IQ and elevated scores on various standardized tests, it is hard to believe that he is sincere about his difficulty with school work, particularly math.

JR is to some extent a self-absorbed person who does not see how his behavior effects himself and those around him. Some percentage of his behavior is connected with his emotional disability. Nonetheless there is a component that he can control and is inexcusable. He often blames others for his predicaments. If he did not want to participate in an activity he would simply refuse to do it, claim that he was not given adequate help, or that the work was boring. There were times in school when the material probably was boring for JR, but he must take responsibility for himself and initiate corrective action. He cannot sit idly by, oblige teachers to serve him, and require others to mandate every activity.

2. MULTIPLE HANDICAPS.

34 C.F.R. § 300.7(b)(6) states that a multiple disability requires concomitant impairments, the combination of which cause such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. See also 20 U.S.C. § 1401(a)(1). The Colorado Rules at § 2.02(8) provide more detail and require two or more areas of significant impairment, one of which shall be cognitive impairment. "Cognitive impairment" is significant limited intellectual capacity. The other required area(s) of significant impairment can be, *inter alia*, physical or emotional. The combination of the impairments must create a unique condition that is evidenced through a multiplicity of needs which prevent the child from receiving a reasonable educational benefit from regular education.

Requirement number one is proof that the student is significantly limited intellectually. Petitioner has been unsuccessful in proving that JR is a child with significant limited intellectual capacity. He has scored repeatedly and over time at the average or above average level on individually administered measures of cognition. (See e.g., Exhibits A, J, 5, and 14). He is very strong in language and reading and is average in math. JR's SIED teacher at one time even tried to use a gifted and talented program with

JR. JR's abilities, talents, and potential for accomplishment are commendable. He is capable of high performance in general intellectual ability, academic aptitude, and inventiveness.

Since JR has no cognitive impairment, then the issue of whether there is a significant physical or emotional impairment becomes moot for purposes of whether he has a multiple handicap. As a result, he cannot be legally classified pursuant to the IDEA as a child with multiple handicaps.

JR does not meet the requirements for an "orthopedic impairment." See 34 C.F.R. § 300.7(b)(7); Rules § 2.02(1). He does not have a severe orthopedic impairment that adversely affects his educational performance. This category is only for serious impairments such as clubfoot, absence of limbs, poliomyelitis, tuberculosis, cerebral palsy, serious burns, or amputations.

JR does not meet the requirements for a "health impairment." See 34 C.F.R. § 300.7(b)(8); Rules § 2.02(1). He does not have limited strength, vitality or alertness, due to a chronic or acute health problem. This category is confined to serious health problems such as heart condition, tuberculosis, rheumatic fever, sickle cell anemia, epilepsy, leukemia or diabetes. Further, the serious health impairment must also adversely affect the child's educational performance.

2. LEAST RESTRICTIVE ENVIRONMENT.

The school District is to ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. They are to ensure that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550; C.R.S. § 22-20-103(5.5); Rules § 5.02.

Placement of children with disabilities in a school other than the home school shall take into account the proximity of the school to the child's home. Rules § 5.02(1). The rationale for placement of a child with a disability in an alternative to the home school shall be documented on the IEP form. Rules § 5.02(3). The rationale for providing services outside of the regular classroom shall be based on student needs and shall also be made apparent on the IEP. Rules § 5.02(4).

District 60 did take into account JR's home school and rejected that in favor of an elementary school with an SIED lab. However, District 60 did not document the rationale for placement of JR at that particular school in their IEP form. Nor did they adequately provide the rationale for providing services outside of the regular classroom on the IEP.

As far as Petitioner's mainstreaming argument is concerned, the testimony and evidence clearly proved that JR had an emotional or social functioning disability which prevented him from receiving a reasonable educational benefit from regular education. For example, he would sometimes display an unexpected or atypical affect for the situation. He expressed physical complaints which may not have been due to any medical condition. He at times avoided social interaction to the extent that it was difficult to maintain relationships. He displayed a pattern of aggression toward persons to an extent that development or maintenance of satisfactory relationships was prevented. He had very limited self-control. He at times had an impaired ability to pay attention. He sometimes exhibited patterns of bizarre or exaggerated behavior reactions to his environment. Given these characteristics, his hospitalizations, and history at other schools, District 60 did not have to begin JR in the regular education program to see how he would do. The District's choice to place in him some type of SIED unit was appropriate.

District 60 was sensibly following two previous educational agencies and two in-patient facilities in their assessments. Arizona placed JR in special education classes.

(Exhibit D). Parkview and CMHIP placed JR in special education. District 70, JR's previous district, placed JR in special education classes. (Exhibit J).

JR was in some regular education classes. District 60 tried a variety of instructional and/or behavioral interventions which would have allowed JR to further expand into regular education. Expansion into additional regular education did not occur because JR was simply unable to build or maintain relationships, would not do his work, and was at times out of control. He was unable to meet many environmental (school, counseling, treatment, community) demands and assume responsibility for his own and others' welfare. Testimony and exhibits also showed that not only was he socially dysfunctional in the school environment, he could be dysfunctional in hospital settings, treatment facilities, the community, and when with Mother. Although there is a strong presumption for mainstreaming, it would have been futile to place JR full time in a regular classroom, even with services. District 60 placed JR in the least restrictive environment given his history and behavior.

3. SUPPLEMENTARY AIDS AND SERVICES

Each District is to provide a free appropriate public education (FAPE) in the least restrictive environment. FAPE includes supportive special education services.

Supportive services assist a child who has a disability to benefit from special education. "Services" include psychological services, physical and occupational therapy, and counseling services. 20 U.S.C. § 1401(a)(17); 34 C.F.R. § 300.16. Counseling services can include treatment from qualified social workers, psychologists, or other qualified personnel. 34 C.F.R. § 300.16(b)(2). Psychological services includes psychological testing, test interpretation, obtaining information, staff consultation, and counseling. 34 C.F.R. § 300.16(b)(8).

Colorado views "services" as those services required to enable a child with a disability to receive an appropriate education. Rules § 5.03. The State's continuum of

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services is contained at § 5.03(2)(a)-(d) and ranges from regular education with supports to hospital settings. The delivery system is to include services in academic, developmental, and life skills. Rules § 5.03(3).

Petitioner has carried his burden to demonstrate that JR is in need of psychological counseling. JR has been or should have been in counseling for years, has exhibited severe emotional problems, has been diagnosed with several psychiatric disorders, has been hospitalized two times, has taken and still takes psychotropic medication, and has IEPs that required psychological counseling. (See Exhibits B, G, J, CC, 2 and 17).

Petitioner has carried his burden to demonstrate that JR is in need of physical therapy, occupational therapy, or adaptive physical education. (See Exhibits A, E, H, J, K1, M, X and 3). Psychologists, occupational therapists, IEP teams, a physical therapist, and Mother all provided information to support the need for this type of service. The District's own personnel found that JR needed some accommodation for his coordination problems, was removed from physical therapy without input, and should be in adaptive physical education. Although medical doctors found that JR had few or no medical problems, these M.D.s were not qualified physical therapists and were not screening JR for physical therapy services. Deference is given to the experts in the field.

Since there is no requirement that the student with the disability be in regular education to obtain special education support services, the education agency, with appropriate outside input, determines what therapy or service is necessary. That is, District 60, after a professional assessment and school personnel input (including Mother), can determine what particular service best meets JR's educational needs.

4. IEPs

Pursuant to the State Rules, upon JR's transfer to District 60 from District 70, the District should have done one of the following: (1) provide services immediately in accordance with JR's District 70 IEP, (2) refer JR for services for diagnostic purposes, or

(3) refer JR for a complete assessment and planning. See Rules § 4.06. Testimony and exhibits indicate that none of these requirements was successfully undertaken.

An IEP is a written statement developed in a meeting by an educational unit which is specially designed to meet the unique needs of a child with a disability. Federal law anticipates that at least a local education agency representative, the child's teacher, a parent, and possibly the child, attend the meeting. 20 U.S.C. §§ 1401(a)(20), 1412(4), 1414(a)(5); 34 C.F.R. § 300.344; Rules §§ 4.05(1)-(9). Either the teacher or the agency representative should be qualified in the area of the child's disability.

The IEP is to include: (a) statement of the child's present levels of educational performance, (b) a statement of annual goals, including short term instructional objectives, (c) a statement of the specific educational services to be provided and the extent to which the child will be able to participate in regular educational programs, (d) the projected date for initiation and anticipated duration of such services, and (e) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. § 1401(a)(20); 34 C.F.R. § 300.346; Rules § 4.05(4).

Meetings held for the review of an IEP should include, in addition to the people listed above, the director of special education or designee, the child's regular education teacher and/or counselor, the child's licensed/certificated special educators, and others at the discretion of the parent or unit. Rules § 4.05(3)(b).

As a refinement to the Federal IEP requirements, the State Rules at § 4.05(4) require a statement of, (a) the child's educational needs, (b) the specific amount of services to be provided, (c) whether the student shall achieve the content standards adopted by the district or whether the student shall achieve individualized standards which would indicate the student has met the requirements of the IEP, (d) the modifications necessary for the child to participate in the regular education program, (e) where the services will be provided, (f) the extent to which the child will participate in regular education programs, and, (g) the rationale for providing services outside of the regular classroom if the accomplishment of IEP goals cannot be achieved satisfactorily there, and documentation of the options considered.

All of the District 60 IEPs were inadequate to varying degrees. Although intended ostensibly as a "planning conference" report, Exhibit K2 imprecisely chronicled JR's educational needs and the criteria used to determine the inability to receive reasonable educational benefit from regular education. The "IEP" omitted a statement of the specific special education and related services to be provided. There was no specified amount of services to be provided, and the manner in which the services would be delivered was unclear. No content standards or individualized standards were provided. Exactly where the services were to be provided was lacking. There was little or no criteria used to determine JR's inability to receive reasonable educational benefit from regular education. If the previous school District's IEP was intended to be used along with this IEP, it was not attached and, as it turned out, was later rejected.

The IEP in Exhibit L was deficient. There were no annual goals and short term instructional objectives that measured progress toward the goals with objective criteria and evaluation procedure and schedules. Although there is a short description of the special education services, the statement did not include the specified amount of services to be provided so that the commitment of resources and the manner in which services would be delivered would be clear to all who would be involved in the implementation of the IEP. Likewise, "mainstream as deemed appropriate" and placement "as behavior dictates" is inadequate for IEP purposes. There was no explanation in the IEP as to why the home school would not be appropriate and the least restrictive alternative. There were no standards which would indicate whether JR had met the requirements of the IEP. Although there was ample information before the review committee that JR had been in and needed psychological services, no licensed psychologist attended the review.

Another IEP review took place about a month later. (Exhibit M) No previous IEPs or other documents were attached, other than a staffing report from a teacher. The present levels of functioning, achievement, and performance were covered as to behavior only. Present levels were not otherwise included as to any other category. The participants did not provide a statement of the criteria used to determine JR's inability to receive reasonable educational benefit from regular education. There were no annual goals or short term instructional objectives in the IEP. There was no statement of specific special education and related services. The content or individualized standards to be used were not stated. Some of the modifications necessary to participate in regular education were covered in a narrative format. It was not clear to what extent JR would participate in a regular education program. There were no dates for the initiation of services and the anticipated duration of the services.

Since JR had already left the District for home schooling by this time, it is understandable that some of the Federal and State IEP requirements might be overlooked. But given the District's statement that "the purpose of this planning conference is to discuss educational options in an effort to continue to provide special ed[ucation] and regular ed[ucation] services in the school district," the IEP should have been more thorough. As it was, it was not in compliance with Federal and State requirements.

5. HOME SCHOOLING AND SPECIAL EDUCATION SERVICES

The purpose of the IDEA is to assure that all children with disabilities have available to them a FAPE. 20 U.S.C. §§ 1400(c), 1412(1)-(3); 34 C.F.R §§ 300.1, 300.121, 300.122, 300.123, 300.126, 300.128, 300.300; C.R.S. § 22-20-102; Rules § 2.02 . Procedures must be established to assure that children with disabilities, including children in institutions and other care facilities, are educated with children who are not disabled. 20 U.S.C. § 1412(5). Private homes are not discussed in the statutes, regulations, or rules. Nonetheless, there is no limitation expressed in the statutes or regulations on where a FAPE must take place. 20 U.S.C. § 1401(a)(18); 34 C.F.R. § 300.8. Each administrative unit shall provide a FAPE to children with disabilities within its jurisdiction. Rules § 5.01. Each administrative unit shall make available special education services for children with disabilities. Rules § 5.03. There is no facility limitation on where special education may take place. 20 U.S.C. § 1401(16); 34 C.F.R. § 300.17. The IEP provisions apply to any child with a recognized disability. 20 U.S.C. § 1401(a)(20); 34 C.F.R. § 300.340.

Local education agencies do not have to pay for private school, but must make services available to the child with a disability who is in private school. 20 U.S.C. §§ 1412(2)(B), 1415; 34 C.F.R. § 300.403. Children with disabilities in private schools generally must have IEPs. 20 U.S.C. §§ 1413(a)(4)(A) and (B); 34 C.F.R. §§ 300.348, 300.349. "Private school or facility" is not defined in IDEA statutes or regulations, and the ECEA and supporting Rules provide no guidance.

However, a FAPE is by definition "under public supervision and direction." *Emphasis added.* 20 U.S.C. § 1401(a)(18)(A); 34 C.F.R. § 300.8; Rules § 5.01(3). Given the context, "public" means of, belonging to, concerning, or pertaining to the people of a state or community as a whole. The context also connotes a "public" known by, or open to the knowledge of, all or most people. Further, "public school" is an elementary or secondary school that is part of a system of schools maintained by public taxes and supervised by State authorities, offering education, usually free, to the children and youth of the district. To be "public" is synonymous with being open, common, or general.

The school system, whether it be public or private, oversees the child's education under the IDEA. Home schooling is, by parental choice, not under the daily supervision or control of a school district. Additionally, it would impractical and costly for a school district to provide services at every student's home. Further, home schooling runs contrary to the concept of mainstreaming, since tutoring at home is in a private setting, usually one-on-one, and without the staff, buildings, equipment, supplies and implements normally available at public school. See 20 U.S.C. § 1412(5)(B); 34 C.F.R. § 300.550; C.R.S. § 22-20-103(5.5).

Both parties cited the School Attendance Law of 1963 at § 22-33-104.5. The purpose of the school attendance law is for the most part to require school attendance for children. The section that the parties cite is limited to a few subsections of that Law. By its own limitation, § 22-33-104.5(2) states that it is to be used "... in this section:...." For this reason, the HO does not find this section of the School Attendance law to be decisive as to the ECEA. However, it does provide some guidance and is compelling. See also, Letter to Williams, 18 IDELR 742 (1991).

Home schooling does not constitute enrollment in a public school or a private school or facility. As a result, the requirements of the IDEA and its State counterpart do not apply to home schooled students. A school district does not have to provide a FAPE for a home-schooled child with a disability.

6. LEARNING DISABILITY

A child with a disability can be defined as one with a specific learning disability. 20 U.S.C. § 1401(a)(1)(A). More particularly, the C.F.R. states that it is a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. 34 C.F.R. § 300.7(b)(10). The term does not apply to children who have learning problems that are primarily the result of an emotional disturbance. Id.

The ECEA and the supporting Rules do not contain a category for a "learning disability." The closest category that the State observes is called a "perceptual or communicative (PC) disability." C.R.S. § 22-20-103(4); Rules § 2.02(6). Like Federal law, a Colorado PC disability does not include students who have learning problems which are primarily the result of a significant identifiable emotional disability. Rules § 2.02(6)(a). Additionally, the student must have a disorder in the psychological process which affects language and learning, and which consists of a difficulty with cognitive and/or language processing. Rules § 2.02(6)(b)(i).

JR without a doubt has many issues that are collateral to and in addition to his emotional disability. Some of these inabilities are by choice and some are baggage that comes with SIED. But not all learning problems are necessarily learning disabilities. All agree that JR is a child with a SIED. Therefore, he cannot be considered to have a learning or PC disability. Even if JR was not SIED, it would be questionable whether he has an incapacity which significantly affects his cognitive and language processing. He has a high IQ, exceptional language ability, and average to above average scores on standardized tests.

6. RECORDS ACCESS

IDEA procedural safeguards require that the parent be able to examine all relevant records. 20 U.S.C. § 1415(b)(1)(A); 34 C.F.R. § 300.502; Rule § 6.01(1). The education agency shall permit a parent to inspect and review any education records relating to her child. 34 C.F.R. §300.562(a). The agency is to comply with a request without unnecessary delay. Id. The parent can obtain copies. 34 C.F.R. §300.562(b). However, the agency can charge a reasonable fee for the copies. 34 C.F.R. § 300.566. An agency may presume that the parent has authority to inspect and review records relating to her child. 34 C.F.R. §300.562(c). A "record of access" is necessary only for persons other than parents and authorized employees. 34 C.F.R. § 300.563; Rules § 6.01(2).

JR's Mother met with some delay and resistance when she attempted to gather her son's school records. She made requests of district personnel that went unanswered. She was required to sign a "record of access" to review school records. The Special Education Director testified that Mother had to make a written request for special education records. Nonetheless, the school is required to maintain confidentiality of the records. For this reason, it is reasonable for the district to request, for example, some form of identification from parents and use some type of sign-in sheet for parents who request to review records. However, no parent need sign a formal "record of access."

The district can charge a fee for copies, but the fee must be reasonable and not prevent the parent from exercising their right to inspect and review the records. Although Respondent is legally correct, it would be hyper-technical to only provide copies to parents who live far away. It is cumbersome to expect someone to review extensive school records while sitting in an office. Copies are often necessary to prepare for due process hearings, litigation, medical purposes, social security applications, or other purposes.

Accordingly, District 60 has to some degree violated the IDEA when it hindered Mother's access to her son's school records.

7. CONSENT

The State and the local education agency are to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the State or the local education agency. 20 U.S.C. §§ 1412(2)(D), 1417(c). Parental consent must be obtained before personally identifiable information is disclosed to anyone other than the officials of participating agencies. 34 C.F.R. § 300.571.

Mother signed releases to allow District 60 personnel to provide and exchange information on JR with Parkview and CMHIP. The exchange was to include psychological and academic information. Dr. Hardy worked with both psychiatric facilities and Dr. Peters worked with Parkview. The releases were to allow the District to gather information to be able to provide JR with "educational program planning." School district employees spoke with Dr. Peters at Parkview about JR and Dr. Hardy's

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assessments of JR. The teacher and social worker were looking for solutions for JR's unacceptable behavior. Accordingly, the District did not breach any confidentiality requirement.

V.
DECISION

1. SUPPLEMENTARY AIDS AND SERVICES

District 60 shall provide JR with counseling services within twenty school days after the receipt of this Decision. This may include the services contemplated by 34 C.F.R. § 300.16(b)(2) or (b)(8) but at a minimum should begin with weekly individual counseling. The person who provides the counseling shall be licensed or certificated and qualified to work with persons who suffer from SIED.

District 60 shall provide JR, within twenty school days after the receipt of this Decision, with occupational therapy, physical therapy, or adaptive physical education as described at 34 C.F.R. §§ 300.16(b)(5) and (b)(7) and § 300.17(b)(2). Before implementing the service of their choice, District 60 shall asses JR with an appropriate national standardized test, or obtain and rely on the physical therapists data obtained from District 70 (Exhibit K1) in determining the most appropriate delivery system.

These special education services shall not be required if Mother continues to home school JR. District 60 may however voluntarily agree to provide these services.

2. IEP

Within fifteen school days after the receipt of this Decision, District 60 shall convene a meeting to develop an IEP. The IEP shall comply with the requirements of the IDEA and the ECEA, particularly the State Rules at § 4.05. The participants at the meeting shall include those persons listed in the Rules at §§ 4.05(3)(a) and (b). The IEP shall include the statements, recommendations, descriptions, dates, and rationale required by Rule § 4.05(4). Mother may invite anyone who, in her discretion, would assist in the IEP process.

District 60 shall, to the extent appropriate, place JR in an environment in which he is educated with children who do not have disabilities, unless the IEP team finds that the nature or severity of his disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. LRE is a placement issue and should be based on the IEP. The LRE should be considered once the new IEP has been developed.

The IEP requirement does not apply if Mother continues to home school JR.

3. RECORDS ACCESS

District 60 shall presume that Mother has authority to inspect and review information relating to her son. The agency shall comply with any request without unnecessary delay and before any meeting regarding an IEP or hearing related to the identification, re-evaluation, or placement of JR, and in no case more than three (3) working days after the request has been made, as required in § 24-72-203(3) C.R.S. When providing review of JR's records to his Mother, District 60 shall provide appropriate staff members to assist in the interpretation and explanation of the information contained in the records, upon Mother's request. District 60 shall provide copies of the records containing the information upon Mother's request, and the District may charge a reasonable fee for copy costs. Mother does not have to sign a "record of access." She will however provide identification if requested and allow the District to indicate on an appropriate form that Mother has checked out JR's educational records for inspection.

4. OTHER

Due to JR's history and success with medication, he should remain on any psychotropic medications prescribed by an M.D. or psychiatrist. Mother shall ensure that JR receives the medication.

VI.
APPELLATE RIGHTS

Appellate rights are contained at the Colorado State Plan, § B.VII.B.8. and are attached.

DATED: November 04, 1996

Christopher D. Randall

CHRISTOPHER D. RANDALL, ESQ.
IMPARTIAL HEARING OFFICER
P.O. Box 280911
Lakewood, CO 80228-0911
(303) 989-5732, 331-6437, 324-8345

CERTIFICATE OF MAILING

The undersigned hereby certifies that copies of the foregoing Decision were mailed first class postage prepaid to the following on November 04, 1996, to the following:

Ms. Pearl McDuffie
Special Education Services Department
Colorado Department of Education
201 E Colfax Ave.
Denver, CO 80203

Ms. Melinda B. Orendorf, Esq.
409 N. Main, Suite 413
Pueblo, CO 81003

Ms. Jill S. Mattoon, Esq.
Petersen, Fonda, Farley, Mattoon, Crockenberg & Garcia, P.C.
650 Thatcher Building
Pueblo, CO 81003

Christopher D. Randall

Case No.: **L96:115**

Status: Impartial Hearing Officer Decision

Key Topics:
Free Appropriate Public Education (FAPE)
Individual Education Plan (IEP)
Independent Evaluation
Extended School Year (ESY)
Unilateral Placement

Issues:

- Whether the district provided a FAPE supported by a written IEP that met the student's unique needs.
- Whether the district failed to consider the results of an independent evaluation.
- Whether the IEPs failed to include objectively measurable standards.
- Whether the student was eligible for ESY services.
- Whether the parents are entitled to reimbursement for the cost of private tutoring.
- Whether the parents are entitled to reimbursement for the cost of the student's participation in a remedial reading program.

Decision:

- The district did develop measurable objectives in the IEPs.
- The district did consider the results of an independent evaluation and implemented many of the recommendations, however, they failed to consider and implement recommendations that the student would benefit from an intensive program in the remedial reading program and tutoring in specified educational disciplines.
- The IEPs were not inappropriate and inadequate, but were lacking specificity in the goals and did not fully meet requirement for detail. This does not constitute a failure by the district to provide FAPE to the student.
- Extended school year services were not appropriately evaluated or considered.
- IHO denies Petitioner's claim for reimbursement for tutoring. Placement with the tutor constituted a unilateral placement by the Petitioner. This tutor/service was not incorporated in the Student's IEP and does not meet the standards set forth in the CDE State Plan.
- Parents are entitled to reimbursement for the cost of the student's participation in the remedial reading program as compensation for the ESY program denied the student.

Discussion:

- Orders of the IHO

DUE PROCESS HEARING,
COLORADO DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

DEC 16 1996

CASE: L96:115

FINDINGS AND DECISIONS OF IMPARTIAL HEARING OFFICER:
William F. Muth

IN THE MATTER OF: [redacted] through and by his parent,
[redacted]

Represented by: pro se

Petitioner,

v.

Telluride School District R-1
Dr. Ann M. Brady , Superintendent

Represented by Counsel: Miller, DeLay and Crabb, P.C.
Kenneth A. DeLay

Respondent

PROCEDURAL MATTERS

Under the date of July 24, 1996, the Petitioner, on behalf of his minor son directed a letter to Ann M. Brady, PhD, Superintendent of Schools, Telluride School District R-1, Telluride, Colorado, requesting a due process hearing. The Petitioner stated as follows: "I received your letter of July 18, 1996 and was disappointed that the Telluride School District has decided not to pay for the cost of placing (Student) in the Lindamood-Bell program this summer. It is unfortunate we have not been able to come to a mutually acceptable resolution of our differences. We therefore request that a due process hearing be scheduled before an impartial hearing officer pursuant to the IDEA and Section 504 of the Rehabilitation Act. We understand that the process must be completed and a decision given by the hearing officer within 45 calendar days of the receipt of our request. We further request that you inform us immediately of free or low-cost legal assistance." This letter was signed by the parent as the Petitioner.

On August 13, 1996, the Colorado Department of Education, Special Education Services advised William F. Muth by letter that he had been selected as the Impartial Hearing Officer (IHO) to hear this case. The IHO was advised in that same communication that the School District would be represented by counsel, Miller, DeLay & Crabb, PC. On August 14, 1996, the IHO contacted the counsel for the Respondent in this matter, Kenneth DeLay, and advised him that there would be a Prehearing Conference to be held at a date to be selected later. On August 15, 1996, the IHO received a return call from the Petitioner. The Petitioner advised the IHO that he, as Petitioner, would be representing himself (pro se) in this matter. The Petitioner was at that time advised of his rights as set forth under the Individuals with Disabilities Education Act (IDEA), 20 USC.,Section 1415 and the Colorado Department of Education State Plan for 1995-97, Section VI. The Petitioner advised the IHO that he had no objection to the Prehearing Conference and the Due Process Hearing (DPH) being held at facilities provided by the District.

The Prehearing Conference was set for September 5, 1996. On August 30, 1996, the IHO participated in a telephone conference call between the counsel for the Respondent and the Petitioner. Both parties requested to postpone or cancel the Prehearing Conference set for September 5, 1996, so they could attend a meeting and attempt to reach a settlement. A written motion for such a delay or extension was received from the Respondent and the IHO granted this delay of proceedings with the understanding the parties would advise the IHO no latter than September 12, 1996, if they had been able to reach a settlement.

On September 13, 1996, the IHO received written notice from Respondent's counsel stating the parties were unable to reach a settlement. The Prehearing Conference was rescheduled for October 9, 1996. On October 4, 1996, the Petitioner entered a motion requesting a continuance of the Prehearing Conference for at least one week. The IHO denied the Petitioner's request for a rescheduling of the Prehearing Conference, but did grant his oral request to begin the Prehearing Conference at 1:45 pm on October 9, 1996. Prior to the Prehearing Conference both parties were requested to submit to the IHO and to exchange with each other Prehearing Statements stating the parties position and to document as to how they would present their case. Neither party presented a Prehearing Statement prior to the holding of the Prehearing Conference. The Respond[illegible] presenting a Prehearing Statement at the beginning of the Prehearing Conference. The Petitioner did not present a Prehearing Statement at that time. The IHO went forward with the Prehearing Conference based on the Respondent's Statement and the ability of the Petitioner to verbally state his claims during the Prehearing Conference. The Petitioner agreed to furnish a written Prehearing Statement no later than October 23, 1996, which would confirm the issue and statements set forth by the Petitioner during the Prehearing Conference.

The Petitioner initially requested a due process hearing be scheduled "pursuant to the IDEA and Section 504 of the Rehabilitation Act." The IHO informed the Petitioner that the Colorado Department of Education IHO has no jurisdiction for a hearing under Section 504. However, the issues and claims of the Petitioner could be heard under IDEA. Since the Petitioner did not submit a Prehearing Statement and the Respondent did not provide all of his documentation at this time, the IHO agreed to allow the parties to exchange their Prehearing Statements and evidence five days prior to the Due Process Hearing. Also, disputed and undisputed facts and stipulations were not resolved during the Prehearing Conference. The IHO instructed the parties that since they both intended to call the same witnesses, the IHO would have the witness appear only one time and both parties could make direct examination and cross-examination at the one appearance of the witness. The Petitioner enumerated the issues he was raising in this matter and the IHO received an agreement from the parties as to the issues.

In examining the issue of the burden of proof, the IHO had only to go on the oral testimony the Petitioner could give since written documentation had not been submitted to the IHO prior to the Prehearing Conference. The Petitioner was requesting reimbursement for expenses the Petitioner incurred which he claimed were due to inappropriate IEPs. However, the Petitioner indicated that the programs for which he was requesting reimbursement for had not been written into the IEP. When asked if part of the Petitioner's dispute is something beyond what is in the IEP. the Petitioner replied, "Correct, and that either additional or different services should have been provided." The IHO felt that if the issue was the Petitioner challenging what the school had provided under the IEP. then it would be incumbent upon the District to demonstrate the burden of proof. But in this case, lacking written documentation, the IHO placed the burden of proof with the Petitioner based on what knowledge the IHO had, and that it was the Petitioner seeking to change the status quo and the Petitioner was seeking reimbursement and funding from the District. The Petitioner made objection that he felt the District should share the burden of Proof regarding the adequacy of the IEP but agreed to go forward with the Burden of Proof.

No motions were entered during the Prehearing Conference. The parties were informed of the process of securing subpoenas. The parties agreed to the sequestering of witnesses during the Due Process Hearing and the Petitioner requested the hearing be closed to the public.

Under date of October 28,1996, the IHO issued a Prehearing Order reciting the issues agreed to and other matters considered and determined at the Prehearing Conference.

The Due Process Hearing date was delayed one day to accommodate the Petitioner.

A Due Process Hearing in this matter was held before the Impartial Hearing Officer at facilities provided by Telluride School District R-1 in Telluride, Colorado, commencing at 8:35 am on November 5, 1996, and proceeding through until 2:40 pm on November 7, 1996. The Petitioner appeared pro se. Although the Petitioner is a practicing attorney, it was stated by the Petitioner and was observed by the IHO that the Petitioner was not well versed or an expert in the field of law involving this matter. The IHO therefore advised the parties that he would allow as much flexibility as possible in the examination of witnesses and the review of documentary evidence. The IHO advised both parties that the primary duty of the IHO was to obtain facts and relevant evidence in order to achieve an appropriate decision in this matter. The Petitioner was again advised of his rights to be represented by counsel, to have the hearing closed to the public, and to have the student in attendance if he so choose. The Petitioner responded that the student would not be in attendance during the hearing. The IHO read the issues and the relief the Petitioner was requesting into the records. Both parties agreed that these were the issues.

The IHO then stated for the record that jurisdiction of the hearing and the IHO jurisdiction in this matter is conferred by IDEA 20U.S.C., Part 1415, 30 CFR, Part 300 et seq and CDE State Plan, FY 1995-97 for IDEA, Part B, Sect.VII. After discussion the parties agreed to the disputed and undisputed facts and stipulations as set forth in the Prehearing Statements. The parties agreed to the admission of the evidence as listed and proposed by both parties with the exception that the Respondent objected to the possible admission of two of the Petitioner's documents dealing with the Petitioner's evaluation by the Lindamood-Bell program in California. The IHO examined the documents and advised the parties that the IHO would allow these to be entered with the understanding that the IHO would make a determination during the course of the DPH to the extent that he would consider the credibility and relevance of these exhibits. Both parties agreed to this arrangement. Both parties agreed that the exchange of exhibits and documentation between the parties had been completed. The Respondent's exhibits were entered as A through QQ. Petitioner's exhibits were entered as No. 1 through 32. Later during the Hearing, the Petitioner offered three other pieces into evidence. These were identified as No. 34, 35 and 36, and were accounting records purporting to support the Petitioner's claim for reimbursement. The Respondent objected to these being admitted at this late time, claiming they had not seen them five days prior to the Due Process Hearing. The IHO examined the documents and ruled they would be allowed to come in since the Petitioner had stated in the Prehearing Conference and later during this Hearing by sworn testimony that the documents in question were submitted as accounting support of the reimbursement the Petitioner was claiming. The Respondent had no further comment on this decision. The parties jointly called eleven witnesses. Each party endorsed one expert witness. The parties agreed to allow one witness to be presented from out of state by telephone conference.

Near the end of the 3d day of the DPH, both parties by oral stipulation and motion moved to have the date for the IHO's decision extended through December 4, 1996. This extension was granted by the IHO. At the time the Hearing was convened there were no outstanding motions before the IHO and objections raised during the Hearing were acted on as the Hearing was in progress. Interim placement of the student during the course of this DPH and awaiting the decision was not raised as an issue. On December 2, 1996, by oral motion, the Petitioner moved to have the date for decision extended to December 13, 1996. The Respondent agreed to this extension and the IHO granted the motion.

ISSUES:

Claims of the Petitioner stated hereinafter are taken from the oral testimony the Petitioner gave during the Prehearing Conference and from the written statements presented in the Petitioner's Prehearing Statement received October 23, 1996. The Respondent had opportunity during the Prehearing Conference to respond to the Petitioner's oral claims and has adequately responded to the Petitioner's claims in the Respondent's Prehearing Statement under Respondent's defense and again under Respondent's disputed issue of facts. The Petitioner raised the following issues and claims in this matter:

PETITIONER:

A. The Petitioner claims that the Respondent, Telluride School District R-1 has not provided and does not now provide a free appropriate public education (fape) supported by a written IEP that meets (Student's) unique needs. The Petitioner claims as follows:

a. The District failed to consider the results of an independent evaluation.

b. The IEP developed for (Student) in November, 1995, was inadequate and inappropriate because it failed to include objectively measurable standards (goals and objectives set forth are inappropriate and inadequate).

c. The IEP developed for (Student) on May 31, 1996, was inadequate and inappropriate because it failed to include objectively measurable standards (goals and objectives set forth are inappropriate and inadequate).

d. (Student) was eligible for Extended School Year (ESY) services for the summer of 1995.

e. (Student) was eligible for ESY services for the summer of 1996.

f. The parents of (Student) are entitled to reimbursement for the cost of private tutoring since early 1995.

g. The parents of (Student) are entitled to reimbursement for the cost of (Student's) participation in the Lindamood-Bell remedial reading program during the summer of 1996.

B. The Petitioner requests relief in this matter as follows:

a. The Telluride School District R-1 be directed to reimburse the Petitioner for the cost of private tutoring which began during 1995 and has continued on through the present in the amount of approximately $3,000.00.

b. The Telluride School District R-1 be directed to reimburse the Petitioner for the cost of the Petitioner's attendance at a special Lindamood-Bell remedial reading program during the summer of 1996 in the approximate amount of $3500.00.

c. The Telluride School District R-1 be directed to reimburse the Petitioner for the cost of continuing private tutoring for the Petitioner at a cost to be determined.

RESPONDENT:

A. The Respondent denies the allegation of the Petitioner and claims that the Telluride School District R-1 has and does now offer (Student) an fape and has developed an IEP that meets the unique needs of the Petitioner.

a. The Petitioner was not eligible for an ESY program in the summer of 1995.

b. The Petitioner was not eligible for an ESY program in the summer of 1996.

B. The Telluride School District R-1 was not given the time or opportunity to address the parents' concern about (Student's) IEP before (Student) was placed in the Lindamood-Bell program.

C. The Telluride School District R-1 is not required to reimburse Petitioner's parents for the cost of tuition at the Lindamood-Bell summer program for 1995 and 1996, and further is not responsible to reimburse the Petitioner's parents for future tuition costs.

FACTS:

TERMS AND IDENTIFICATION:

1. Petitioner: In this case the Petitioner is the parent of a minor student residing in the Telluride School District R-1 in Telluride, Colorado, and served for special educational purposes by the Southwest Board of Cooperative Services. It is the parent, the father of the student, who requested the due process hearing on behalf of the Student.

2. Student: Refers to the minor child of the Petitioner, referred to hereinafter as the Student. The student is actually the Petitioner in this case represented by his parent or parents. For purposes of clarity, the parents are hereinafter referred to as Petitioner and the minor child is referred to as the Student.

3. District: School District, administrative unit. This is the Telluride School District R-1 and is the School District in which the Petitioner resides along with the Student. It is also known as Telluride School District.

4. BOCS: SWBOCS, SBOCS (Southwest Board of Cooperative Services). A service organization authorized by State statues that serves and provides special educational services to more than one school or school districts. In the case at hand, the SWBOCS serves the Telluride School District. SWBOCS was not named as a Respondent in this request for a due process hearing. (In some documents this agency is inadvertently identified as SBOCES, SWBOCES)

5. IEP: Individualized Educational Program. A written document describing the handicapped student's educational program and developed at a staffing or IEP meeting, consisting of personnel familiar with the handicapped student's needs and whenever possible, includes the parents. This is further described in the IDEA, Sect. 1401(19) and 34CFR, 300.30.

6. ESY: Extended School Year. Services provided by a school district to an eligible special education student in addition to the regularly scheduled school days or hours.

7. Staffing: A meeting held where the parents are invited to attend along with school personnel and other invited or relative parties to discuss the handicapped student's program. This could be the initial meeting to write the first IEP, annual review, or the triennial review. A Staffing may also occur intermittently during the year if necessary to review and discuss a student's program.

8. Annual Review: A Staffing held, usually at the end of each year, to review the student's progress in the terms of the IEP during the past year.

9. Triennial Review: A review held three years after a student is initially staffed into special education. The triennial review is mandated under the IDEA and the CDE State Plan. At the triennial review the IEP may be revised if required.

10. FAPE (fape): Free appropriate public education. The designation used in the IDEA and related regulations and CDE State Plan that special education and related services are provided at public expense to meet the educational standards of the regulations, provided in an appropriate setting and are provided in conformity with the regulations. IDEA 1401(18). 34CFR 300.300. CDE State Plan, Part II, Sect. II.

11. LRE: Least restrictive environment - Required by regulation to provide education for all handicapped children so that to the maximum extent appropriate they are educated with children who are not handicapped. 34CFR, 300.550. CDE State Plan, Part 11, Sect. X.

12. IDEA: Individuals with Disabilities Education Act, previously called EAHCA (Education for all Handicapped Children's Act), and stemming from the initial act (Public Law 94-142). This is a Federal law that provides for fape to all eligible handicapped students.

13. 34CFR: The Federal regulation that provides in detail for the implementation of IDEA.

14. Part 300: Appendix C to Part 300 & 301 of Part B Regulations (34CFR) Implementing 1990 and 1991 Amendments to IDEA.

15. CDE State Plan: The Colorado Department of Education State Plan for the education of all handicapped students. At the time of this Due Process Hearing the State Plan in effect is known as FY 1995-97 State Plan under Part B of the IDEA as amended by Public Law 94-142. This State Plan contains the rules and regulations of the Colorado Statuary Law to implement the Federal regulations. The CDE State Plan closely follows the regulations of 34CFR.

16. ECEA: Exceptional Children's Educational Act: Colorado Board of Education rules for the administration of ECEA, 1995 amended rules for administration of Colorado Statute 20-20-101.

17. ROWLEY: Board of Education v. Rowley, 458 US.176, 102S.CP3034(1992). A landmark case decided by the U. S. Supreme Court used extensively as a reference in many due process hearings, state level reviews and state federal court cases to support the decisions. One of the major impacts of this case was to set a determination that: "The actual requirements of free appropriate public education is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."

18. IHO: Impartial Hearing Officer, Impartial Due Process Hearing Officer. A hearing officer selected to conduct a due process hearing in accordance with the regulations set forth in the CDE State Plan, Part VII. The hearing officer conducts the hearing and writes the decision setting forth the finding of facts, discussion of the issues, and presents an order to the involved parties.

19. DPH: Due Process Hearing - a hearing conducted by the IHO in accordance with regulations set forth in the CDE State Plan.

20. WISC-III: Wechsler Intelligence Scale for Children, 3d Edition - a test used to determine the IQ or intelligence quotient of an individual. The IQ is usually expressed as a means score arrived at from a series of tests.

21. LAC: The Lindamood Test of Auditory Conceptualization which measures chronological processing skills (the ability to distinguish one speech sound from another and the ability to perceive and compare the number and order of sounds within spoken patterns).

22. GORT-III: The Gray Oral Reading Test - a timed test of oral passage-reading and provides measures of reading accuracy and speed.

23. ADD, ADHD: Attention Deficit Disorder, Attention Deficit/Hyperactive Disorder. A condition that usually inhibits a person's attention span, often demonstrates hyperactivity or inattention, and may result in a learning disability.

24. Dyslexia: A developmental reading disability. Dyslexia now covers a broad range of reading and/or speech recognition disabilities.

25. NJC: National Jewish Center for Immunology, an agency in Denver, Colorado that performed an extensive evaluation on the Student on January 4, 1995, and provided a series of recommendations.

26. Lindamood-Bell Learning Center (Learning Process), an agency located in Newport Beach, California, that performed a diagnostic evaluation on the Student and provided four week of intensive treatment.

CASE FACTS:

1. At the time this DPH was convened, the Student was a nine-year, eight months old male who resides with his natural parents in the Telluride School District R-1, Telluride,Colorado. The Student's parent is the Petitioner in this case on behalf of the Student.

2. The Student entered kindergarten in the Telluride School District in the fall of 1992 and completed the kindergarten session in the Spring, 1993. The parents testified and the school personnel confirmed that the Student exhibited behavioral and emotional problems during the kindergarten session.

3. In September, 1993, the Student enrolled in the Telluride District as a first grade student. In the Fall, 1993, in the months of October and November, a building level meeting was scheduled which required the completion of certain information concerning the Student. In part, the information used for this "screening" consisted of a Student Screening Scale which noted:

A. The Student's academic under achievement and checked off:

a. Readiness skills delayed,

b. Reading skills delayed,

c. Hand writing skills poor,

d. Spelling skills deficient,

e. Classroom seat work unsatisfactory,

f. Slow disabled learner.

B. The Speech and Language Communication checklist noted among other concerns problem areas for the Student were:

a. Unable to follow teacher's oral directions, has short attention span, unable to ask for clarification, sometimes appears not to be listening, appears not to remember and/or understand what has been said.

C. Under Expressive Language:

a. Appears to grope or struggle for words,

b. Uses a limited speaking vocabulary, and a problem in using appropriate volume pitch and intonation.

D. The Education Progress Report submitted by the first grade teacher (undated) noted, "I need to understand better how (Student) sees words. I need strategies to change assignments so (Student) may be successful, raise confidence."

E. Another document, Progress Report, submitted by classroom teacher and a specials teacher noted under: What Does This Child Have Problems Doing - "sitting still and concentrating on one activity for more than ten minutes is very difficult for (Student). (Student) is distracted by everything around (Student). Peer contact is (Student's) priority. "

F. The document titled Cognitive Processing Skills checklist noted under category Speed of Processing as "slow" in the following:

a. Speed shown when perceiving or working with visually based information,

b. Speed shown when perceiving or working with auditory and language based information,

c. Speed shown when problem solving,

d. Speed shown when asked to offer an oral response.

G. This cognitive processing document also indicated problems in the areas of problem solving, organizing and planning, strategic thinking, self-monitoring, and memory difficulties, notably difficulties with short-term memory, and difficulties with long-term memory.

4. Under date of December 2, 1993, one parent signed a consent form for the Student to be evaluated to determine whether or not Student will be considered handicapped as defined in the Federal and State rules and regulations, and will need special services in order to receive an appropriate education. The form also stated these evaluations will be done by persons who have special training to evaluate and identify student needs. Assessed areas of functioning may include the following: physical, education, communication, psychological, social.

On January 17, 1994, an in-depth psychological evaluation was performed by the Telluride School Psychologist, Bob Eberle. From the results of the psychologist's assessment, including the WISC-III testing of the Student's intellectual ability and the Burks Behavior Rating Scale evaluating the Student's behavior by psychologist report states, in part, "The Burks Scale indicates a very significant concern with poor academics. Other significant concerns are with excessive withdrawal, poor ego strength, poor intellectually and poor attention. It is the critical judgement of this examiner that Student has average intellectual ability but may have a genetic disposition towards reading difficulties as noted above. Attention issues at this time appear more reflective of maturational delay than a possible ADHD condition. However, (Student) will be monitored over the course of the next several years to see whether or not an attention disorder exists." Testing was also performed by a special education teacher from the BOCS system. Comments from this teacher noted that the Student's reading, word recognition level was 1.3, math level was 1.6 and no comment on level of the writing. This would indicate, in this teacher's opinion, that the Student was functioning in reading and math at approximately the correct level.

5. A meeting was scheduled with District staff and the parent for 1/30/94. (assessment document is dated 1/29/94). The results of this assessment were: Educational - the Student was functioning at approximately the mid first grade level and needs to learn letters and sounds. No significant needs under Physical. Communication Section - in classroom doesn't participate verbally often. No expressive language or processing concerns. Needs were noted - give time and space to feel comfortable, communication encouraged. Under Psychological - it was noted that WISC-III Test indicated average intelligence, significant weaknesses: mental math computation, non-verbal inductive reasoning, poor academics and poor attention. Needs - moderate attention span. Social -a need to improve self-esteem. The assessing team recommended no placement in special education.

6. A Progress Report issued by the first-grade teacher covering the School Year 1993-94 and signed by the mother of the Student for the first quarter and the second quarter, (all of the four quarters were included in the school year and were filled in). In each area and significantly in reading, writing and spelling and math, the Student had received marks of satisfactory, very good and excellent. This report noted that the Student would be promoted to the second grade.

7. The Student entered the second grade in September, 1994.

8. The parent of the Student signed a document "Approval for Temporary/Diagnostic Placement" (dated it 9/25/94), for a temporary placement of 20 school days in a Resource Program. This document was signed by the special education teacher on 10/25/94.

9. A form indicating permission to place the Student in a special education program was dated 11/21/94. The primary handicap condition was indicated as PC (perceptual communication). Secondary handicapping condition was speech. Services to be delivered in the Resource Room.

10. On 11/28/94, a Staffing was held to develop an IEP for the Student. The Staffing Team consisted of both parents, the speech and language pathologist, the second-grade classroom teacher, a special education educator, and the school psychologist. This IEP was developed based on the input from the staffing team as set forth in a two-page document that preceded the pages containing the goals and objectives of the IEP. This two-page document indicates: handwriting problems, focusing in class, resistance noted. Under Educational: Needs - improve in all academic areas - reading, first-grade level; math, first-grade level; spelling, modified for second grade. Communications: Needs - improve classroom performance. Psychological: Needs - improve attention skills. Social: Needs - improve self-esteem. On the second page of this document was the statement "is child able to receive reasonable benefit from only ordinary education?" No. "Does this child meet criteria for handicapping/disabling condition?" Yes. Stated Handicapping/disabling condition, PC - Reading disability - written language. Recommended - placement in LRE (Regular education with resource intervention). Rationale - significant weakness with reading and written language. Referral for extended school year - No. Needs for this Student as identified in the IEP consisting of three pages was as set forth below:

a. Needs:

Reading: Goal - improve reading skills; objective - when given a first-grade passage of 60 or more words (Student) will be able to read with 80 percent accuracy.

Writing: Goal - improve writing skills; objective - when given a written assignment (Student) will be able to begin and end the assignment within a set time. (Student) will be able to write at least three sentences using correct punctuation with 90 percent accuracy.

Math: Goal - improve math skills; objective - when given ten additional problems with or without carrying a one or two digits, (Student) will be able to get 80 percent correct.

Communication: Goal - improve communication skills. The date required to accomplish these skills is not legible on the document submitted to this Hearing.

11. Date of 12/2/94, one parent signed a document "Statement of Parental Rights." These rights were also included on various other documents of consent submitted in the process of placing this child in special education services. The issue of the parents being aware of or properly informed of parental rights was not brought forward in this case and is not considered an issue.

12. On January 4, 1995, the parents arranged to have a neuropsychological evaluation performed at the National Jewish Center for Immunology and Respiratory Medicine for the (Student), who at that time was a seven year old male attending the second grade in the Telluride District. The parents testified that this facility was selected for the evaluation after investigating several possibilities and were advised that this facility was recognized as a leader in the field of performing the type of evaluation they required. (The Respondent did not question or challenge the validity of this facility.) A report from the National Jewish Center setting forth in detail background information, tests applied to the Student, results of these tests, and a number of recommendations were submitted into evidence by both the Petitioner and the Respondent in this case.

The report indicates that the National Jewish Center administered fourteen individual tests including the WISC-III intelligence test and the Gray Oral reading test. Test results set forth by the facility indicated and confirmed that the Student was currently functioning in the average range of intelligence. This report stated "(Student's) individual sub-test scores revealed some patterns of variations that are important to note. Within the verbal scale, (Student) exhibited a significant weakness on the arithmetic sub-test, which measures knowledge of numerical operations as well as concentration and attention. Quality observations during this sub-test indicated that (Student) was having difficulty holding the questions in working memory long enough to perform the math calculations." "Within the performance scale, (Student's) scores were, in general, lower with the exception of marked strengths on the coding and block design sub-test. These two sub-tests both involved perceptual reproduction or copying. (Student's) strong performance on these tests suggest that perceptual reproduction and non-verbal deductive reasoning skills (working from a whole to parts) are significantly better developed abilities than are (Student's) other perceptual organization and processing speed skills." When tested for academic achievement, the (Student) was graded from middle first grade to nearly second grade level on most applications with the exception of the Gray Oral Reading Test - III. This is a timed test of oral passage reading and provides measures of reading accuracy and speed. "(Student) received the lowest possible score on this test. (Student's) reading was extremely slow and inaccurate. (Student) had a great difficulty with even the first passage which should be read fairly easy by a child in the first grade."

Of significance to this case was a summary statement in this report, "Test results, (Student's) history of difficulty with reading skills since kindergarten, and family history for reading difficulties, strongly suggests that (Student) has a developmental reading disability or dyslexia." Also stated in the summary, "Based on test results, past and present teaching ratings of (Student's) behavior, and behavioral observations during the evaluation, (Student's) attention difficulties meet the diagnostic criteria for Attention Deficit/Hyperactive Disorder, predominately inattentive type."

The National Jewish Center, from the results of their examinations and summaries, provided seven paragraphs of recommendations (with a series of sub-paragraphs), as part of their report. Although all of these recommendations were discussed during the course of this case, of significance to the decision making in this case, were the following excerpts from these recommendations: "We have found that the Auditory Discrimination In Depth (ADD) Program to be very useful for children of (Student's) age and ability level. If possible, individual tutoring by someone in the area who has been trained in one of these methods would be ideal." "Another option would be to have (Student) participate in an intensive Lindamood-Bell workshop. From recommendation 3, "It is important that (Student's) regular classroom teacher be made aware of the nature of his learning disability so that they can make modifications in their circular which will maximize the development of (Student's) strengths without unduly penalizing (Student's) deficiencies." A series of sub-recommendations were then provided in the report which, in summary, suggests "that expectations for (Student) should not be so high as to induce frustration in (Student's) achievement, and that modification of curriculum would be in order to provide for more success by the student." Recommendation 4, "Children with ADHD often benefit from stimulant medication......it is recommended that (Student) receive a medication evaluation in order to determine whether (Student's) attentional process may be improved with medication." Recommendation 7, which is more of a generalized comment, "One of the most serious threats to the continued educational process of learning disabled children is a sense of frustration and failure which they often experience in school......" "It is essential that (Student's) teachers recognize the nature of (Student's) disabilities and continue to provide appropriate support and classroom modifications.....In addition, effort should be made to provide experiences which will furnish success and allow (Student) to develop (Student's) strengths."

The content of this report was used extensively by both parties in this case to support their positions.

13. In the Spring, 1995, based on the recommendations of the NJC Report, the parents of the Student had a medical evaluation done. After trying several options, the parents put the Student on Ritalin in May, 1995. The Student did not take Ritalin during Summer, 1995, but in the beginning of the school year, September, 1995, when the Student was in the third grade (Student) began taking the medication. The teachers in the District were aware that (Student) was taking the medication, and in fact (Student) required some dosage during the school day. The mother of the Student testified that there appeared to be a significant improvement in the Student's attitude and behavior while (Student) was on this medication, and he continued the medication throughout the third grade school year. From testimony from both parents and the teacher, the Student appeared to have ups and downs that could not be totally identified to failure to take the medication, or when on medication. At the end of the school year, the parents took (Student) off medication due to serious concerns about side effects (primarily weight loss), that (Student) exhibited.

14. In the Spring,1995, the parents testified that they followed the recommendation of the NJC Report and engaged the services of a young lady, Megg Lynch, to tutor the Student. No records of her schedule were submitted. The Petitioner testified that she worked with the Student for about an hour a day for an average of three days a week. The parents testified that they believed she had some special education experience; however, there was no evidence presented to document this person's background in teaching or in special education. There was no testimony presented or evidence submitted to indicate that Megg Lynch had any training in the Lindamood-Bell process. The Petitioner testified that Megg Lynch did not have any training in the Lindamood-Bell process.

15. On May 31, 1995, a Staffing was held to review the Student's IEP and make recommendations for the next year. Attending the Staffing were the special education teacher, second grade regular teacher, speech and language pathologist, a special education director, school psychologist, and the father of the Student. (The purpose of this staffing was a review staffing.) The second page of the IEP Review, under Educational, it is noted - Reading - non-reader at 9/94 (refers to previous fall, currently second grade level. Educational - needs to read and write on a consistent basis. There is also a notation," father considering tutoring." Under Physical is noted that - Student been on Ritalin in May. Changes have been seen in academics. More writing. Ability to focus. Needs - continue to monitor medication. Under Communicative - it notes - communication goals objectives accomplished 5/95. Under Psychological - Needs to continue self-esteem gains. On Page 3 of the IEP Review, noted as handicapping condition and rational for placement - PC - Reading and Math - DX ADHD. (There is no explanation given for these terms or statements.) Placement Alternatives - regular education with consultive assistance and regular education with resource intervention. The characteristics of service recommended: regular education 6 hours per day, resource intervention 1 hr per day, beginning in 9/95. Rational - significant reading and writing language difficulties. The program for the special education notes Reading: Goal - to improve reading

skills. Objective - when given an early second grade passage of 60 words (Student) will be able to read with (illegible note) fluency and have 80% accuracy of the words by the end of October, 1995. Additional needs were noted as writing, math, and spelling. Goals were to improve spelling skills and to improve math skills. It is noted that consideration for extended school year was marked - No. The father signed this IEP assessment.

16. On May 31, 1995, the father of the Student wrote to Dr. Brady, Superintendent of Telluride School District R-1, requesting reimbursement for the cost of the outside evaluation done by National Jewish Center in the amount of $1,157.75. He also requested reimbursement for tutoring cost and for anticipated cost of sending the Student to the Lindamood-Bell Program. During the summer there was correspondence exchanged between the Petitioner, School District and the School District's Attorney and in late August, 1995, the District authorized reimbursement for the cost of the National Jewish Center evaluation and denied the school's obligation or intentions to pay for tutoring or placement of the Student in the Lindamood-Bell Program.

17. The NJC report suggested as an option for serving the Student's educational needs would be to have the Student participate in an intensive Lindamood-Bell workshop. The parents of the Student testified that they considered such placement for the Summer, 1995, but decided that the Student was so frail emotionally, due to (Student's) educational failures, that they decided (Student) should take the summer off and be allowed to "just be a boy."

18. The Student entered the third grade in the District in September, 1995. In November, 1995, a meeting was held between the teachers and the parents to review the IEP and consider modifications.

19. The IEP written in the Fall, 1995, included goals: improve reading, improve writing skills, improve math skills, improve spelling skills. The objectives for these goals were more definitive than previous IEPs and this document was updated throughout the year to indicate the progress on achieving the objectives. The objectives, where identified, indicated that the Student was being given the work at a first grade and second grade level, and throughout the year was achieving some success in accomplishing the objectives.

20. An Annual IEP Review Staffing was held in May 28, 1996, the end of the Student's third grade school year. In addition to the parents this meeting was attended by the regular education teacher, special education teacher, special education director, the building principal, and the school psychologist. The entries by the school psychologist indicated, under Math Concepts, "the Student was still struggling, over one year behind in reading and writing despite struggling, has improved in spelling, appears to be reading early second grade level." It was also indicated by the special education teacher that reading skills were early second grade material, spelling skills on a first grade level. Under Math: processing - overwhelmed by too many problems. The IEP Staffing then turned its attention to the following year, which would be the beginning of 1996-97 school year. The program for the coming year indicated an annual goal of improved reading skills and a short-term objective, when given a mid-second grade reading passage to read, Student will be able to read 100 words with no more than five errors 90 percent of the time. (Student) will read with fluency and intonation four out of five trials. For writing, the annual goal was to improve written language skills. The short-term objectives were not related to a grade level. It was noted that the Student would not be eligible for ESY during the 1996 Summer due to "sufficient recoupment."

21. The Progress Report for the third grade for four quarters indicated that the Student was graded satisfactory, very good and excellent in all subject reports, and would be promoted to the fourth grade.

22. A document submitted into evidence by the Respondent titled "Consideration for Extended School Year Data Collection" was undated, but was based on school year 1995-96. This would be consideration for ESY for the summer of 1996. This document is devised to provide periodic reporting of (Student's) academic accomplishments and to compare such accomplishments of activities against a baseline of IEP targeted skills, beginning with a May, 1995 baseline and recording academic achievements after various periods of being out of school during the course of the year. Much of the required data (including the information for the May baseline) is not entered, and there are no comments made to indicate a recoupment rate.

23. Under date of July 5, 1996, the Petitioner directed a letter to the Director of the SWBOCS stating that on review of the IEP for 1996-97 school year, the parents of the Student believe the IEP to be seriously inadequate and inappropriate, and stated their reasons for this belief. The letter asked for a meeting to attempt to resolve the issues of the IEP. There was no indication that such a meeting took place.

24. Under date of July 6, 1996, the Petitioner directed a letter to Dr. Ann Brady, Superintendent of Telluride School District R-1. This letter stated their (Petitioner) intent to place the Student in the Lindamood-Bell Auditory Discrimination In Depth Program during the Summer, 1996, and requested the District to pay the cost of the program of approximately $4640.00. This letter states that the NJC had recommended this program to remediate the Student's reading difficulties and again states their concern about the latest IEP developed for the Student. The letter also indicates the parent's research and discussions they had with different persons that they claimed impacted their decision to select a Lindamood-Bell program. This letter further requests the use of a computer for the Student to use at home since the Student had been making some progress using a computer. The letter also requested that "pending a review of (Student's) performance and testing at the Lindamood-Bell program this summer, I request that (Student) be furnished with a tutor who has been properly trained in either the Lindamood-Bell or Orton-Gillingham method during the coming school year."

25. The Petitioner's letter to Dr. Brady of July 24, 1996, wherein the Petitioner requested a due process hearing, also indicated that the District had advised the Petitioner that they would not pay for the cost of the Lindamood-Bell program for the Summer, 1996

26. During the Summer, 1996, the parents placed the Student to the Lindamood-Bell Learning Processes Program in Newport Beach, Calif. for a diagnostic evaluation. Subsequently, (on July 29, 1996) the Student was enrolled in the Lindamood-Bell Clinic for four weeks of "intensive treatment." The stated focus of the treatment was to develop, 1) auditory conceptualization for decoding and spelling; 2) symbol imagery for word recognition and spelling; 3) concept imagery for language comprehension and vocabulary. The Student was pre-tested upon entering the Clinic and post-tested after approximately four weeks "intensive treatment." Ten test segments were used with a number of sub-tests and the results of the pre-testing and post-testing was submitted in the Lindamood-Bell Progress Report at the completion of the program. The results of each of the testing areas was discussed in the Progress Report and the Clinic provided a summary and recommendations. The Lindamood-Bell Clinical Report indicates the Student made good or substantial progress in several areas, particularly auditory conceptualization/phonemic awareness and in concept imagery. This improvement was attributed to the training received at the Clinic's program. Other tested areas

showed modest or little growth and the Clinic suggested that the Student would need to continue with the type of training provided by the Lindamood-Bell process. The Clinic's report made the following recommendations: that the Student return to a L-B Clinic to continue (Student's) good progress, and the focus of treatment would be: 1) continue development and application of auditory conceptualization to multi-syllable decoding and spelling; 2) continue development and application of symbol imagery to word recognition, spelling and increasing (Student's) reading rate; 3) continue development and application of concept imagery to follow oral directions, expressive vocabulary and written language comprehension; 4) stimulation and applying visualizing and verbalizing techniques to the understanding and application of mathematical concepts.

The Clinic Report further recommended, "in the meantime it will be important for the Student to read and spell daily with an adult who has received formal training using the auditory discrimination in-depth and visualizing and verbalizing programs."

27. In September, 1996, the Student entered the fourth grade in the Telluride School District. At that time, neither the parents nor the District had signed or agreed to the IEP covering the Student's special education program for the 1996-97 school year. The Petitioner testified that currently the Student is attending regular education classes in the District School for most of the day. He started, according to the Petitioner's testimony, in special education classes in the District, but has been withdrawn from special education. There is no special education IEP at this time. He is still receiving tutoring from Ms. Shepard and her son. (Previous testimony had determined that both Ms. Shepard and her son are trained to teach/instruct in the Lindamood-Bell process.)

28. Linda Shepard was qualified as a expert witness - in the Lindamood-Bell Learning Program or Method and its use and application with learning disabled students -for the Petitioner, after questioning by the Petitioner and voir dire examination by the Respondent. The witness testified that she began her training in the Lindamood-Bell Clinic in California in 1981. In California she worked as clinician providing diagnostic measures in intake, pre-test and post-test, and worked primarily with students that had auditory conceptual disfunction. In 1988, she moved to Denver, Colorado, and opened her own clinic. In 1996, she moved to the Telluride, Colorado area with the stated intentions of continuing to practice as a Lindamood-Bell clinician and consultant.

The witness testified that she had been working with the Student since late September, 1996, using the Lindamood-Bell teaching process, and it was her opinion that the Student was progressing in improving (Student's) academic abilities. Linda Shepard described the Lindamood-Bell system as: The Auditory Discrimination In Depth Program is actually considered pre-phonics, and lays the foundation so that students may acquire stronger language skills through a variety of other good reading programs. This, in fact, is not a reading program; it's a linguistically driven pre-phonics program.

The witness testified that she had conducted a 1-week training workshop for teachers in the Telluride District and the SWBOCS. Questioned about this program, the witness responded, "it was teacher training. I laid the foundation for the beginning stages of the Auditory Discrimination Program." Question, "From that training would these people be qualified to use some of the Lindamood conceptualization training?" Answer, "Not qualified, but it would be a beginning place, simply because the training isn't something you can accomplish in two or three weeks." Question, (by the Respondent) "Going back to this training issue, it is your expectation, is it not, the teachers that you worked with, with some of your clinical supervision, could begin to use the Lindamood-Bell method in their classrooms." Answer, "Yes."

DISCUSSIONS AND FINDINGS

Issues in this case were identified at the Prehearing Conference held on October 9, 1996, as set forth in the IHO's Prehearing Order of October 23, 1996, and read into the record at the Due Process Hearing, commencing on November 5, 1996. There were no objections raised by the Petitioner or the Respondent as to these being the issues in this matter.

The Petitioner claims that the Respondent, Telluride School District R-1, has not provided and does not now provide a fape supported by a written IEP that meets Student's unique needs. See full content of Petitioner's issues and Respondents defenses under ISSUE herein above. The Petitioner claims the Respondent failed to provide fape as set forth in Petitioner's claims A. a.,A.b.,A.c.,Ad. and A.e.

REFERENCE:

IDEA: 20 U.S.C. 1401(a)(18() The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public direction and supervision, and without charge, (B) meet the standards of the state educational agencies, (C) include an appropriate pre-school, elementary or secondary school education in the state involved and (D) are provided in conformity with the individualized education program required under Sect. 1414(a)(5) of this title.

34 CFR Part 300 Sect. 300.8.

Appendix C to Part 300 - Notice of Interpretation

Colorado Department of Education State Plan for FY 1995-97 under Part B of IDEA Sect. II. A, Paragraph 1, 2, 3, & 4.

Reference also U. S. Supreme Court Case 458 I/S/ 176, 102 S. Ct. 3034(1982) Board of Education v. Rowley, Part III, C "....insofar as a state is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided a public expense, must meet the state's educational standards, must approximate the grade level used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

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Issue A.a. The District failed to consider the results of an independent evaluation.

REFERENCE:

A. 20 U.S.C. 1415(b)(1): The procedures required by this section shall include but shall not be limited to (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child and the provision of an fape to such child, and to obtain an independent educational evaluation of the child. (Emphasis added)

B. 34 C.F.R. 300.503. a. General. (1) The parents of a handicapped child had the right under this part to obtain an independent educational evaluation of the child subject to Paragraphs (D) through (E) of this Section.

C. CDE State Plan FY 1995-97 under Part B, VI Procedural Safeguards, No. 3.

The Student was in kindergarten in the Telluride School District for the school year 1992-93, and entered the first grade in the District school in September, 1993 (see Facts 2 & 3).

In November, 1993, the District held a "building screening" to evaluate the observations of the school personnel regarding the Student. This screening scale is not a full evaluation, but is held by the school personnel prior to requesting an evaluation approval from the parents. (See Fact 3) This student screening scale apparently indicated to the school personnel that the Student needed additional evaluations due to a series of difficulties (Student) was having in the first grade. The parent signed an approval December 2, 1993, for an assessment evaluation of the Student. This evaluation occurred primarily in January, 1994.. The overall recommendation of this evaluation was that the Student did not require special education services. (See Facts 4 & 5.)

At the end of the first grade the Student was passed to the second grade and entered grade two in September, 1994. (See Facts 6 & 7.)

The parents signed approval for temporary diagnostic placement into special education in October, 1994. The Student was placed into a temporary special education program in November, 1994. The primary handicapping condition was perceptual communication and the secondary handicapping condition was speech. (See Facts 8&9) .. Subsequent to this temporary placement, an IEP meeting was held and the Student was staffed into a special education program (See Fact 10). An IEP was developed for the Student for six to eight hours per week in the resource room with balance of the time in regular education. (Issues regarding the ESY and the goals and objectives of the IEP will be discussed hereinafter under issues relating to these concerns.)

On January 4, 1995, the parents took the Student to Denver, Colorado for a "neuropsychological evaluation" performed by National Jewish Center (See Fact 12). The complete report from NJC was entered into evidence by both parties and referred to extensively throughout this case.

The statement of parental rights signed by the parent (See Fact 11) indicates the parents have the right to "request interpretation of any diagnostic measure to evaluate the Student including any portion of the Student's records and request an independent evaluation at public expense if they disagree with the evaluation obtained by the school district." It should be noted that the statement of parental rights makes no reference: ".....if the final decision is that the evaluation is appropriate (meaning the District's evaluation) the parent still has the right to an independent educational evaluation, but not at public expense." (34 CFR 300.503)

Nothing was brought in through evidence or testimony to indicate that the Petitioner had requested from the District to have an independent evaluation done or had requested sources for such an evaluation. However, the District did not question the use of the NJC for having the evaluation done. There apparently was one piece of correspondence, referred to in testimony but not entered in evidence, directed to the Petitioner by the Respondent's attorney late in the Summer,1995, when the Petitioner had requested reimbursement for this evaluation, that questioned why this particular facility was used. The Petitioner advised that they could find no appropriate facility in the immediate vicinity of Tellunde District, and that this facility was highly recommended to the Petitioner from a nur sources. The Respondent made no other comments about the use of this facility.

During the course of this Hearing, there was nothing introduced by the Respondent to indicate that the District questioned the right of the parent to seek an independent educational evaluation at public expense and there was nothing introduced that indicated that the District had or would initiate a "hearing under Section 300.506 to show that an evaluation is appropriate." Section 300.503(e), "Whenever an independent evaluation is at public expense the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria at which the public agency uses when it initiates an evaluation." (Also, see 20 U.S.C. 1415(b)(1)(A).)

In the Summer,1995, the Petitioner contacted the District and requested reimbursement for the cost of the independent evaluation performed by NJC. The Petitioner requested only the amount of reimbursement charged by the NJC and did not request reimbursement for any travel expenses. The District reimbursed the Petitioner the full amount of the cost of the evaluation. (See Fact 16)

Upon receipt of the completed report by NJC, copies were provided to the District sometime in February or March, 1995, according to testimony by the parents. The District acknowledged having the report in their possession early in 1995 and having shared it with members of the IEP Staffing Team.

When the Respondent questioned their expert witness, the school psychologist, Dr. Eberle, he was asked to examine the exhibit containing the full report of th C. The witness acknowledged that he had reviewed this report recently. Question, "My first questi to you is whether the evaluation of Student that is contained in the report is, in your view, consistent with the evaluation and assessment that you have done with (Student)?" Answer, "They (meaning NJC) were more in-depth. They looked more into the reading difficulties he was having and did a lot more diagnostic testing in that area.....yes, I think the cognitive testing is very consistent, almost pretty close to the same scores." Question, "Is there anything in this evaluation from National Jewish with which you disagree insofar as the difficulties that (Student) may be experiencing with (Student's) disabilities." Answer, "Disagree with, let's see, I have some questions about the comments of the spatial-constructional abilities......I thought they were perhaps over-generalizing from the amount of testing they did in that area." Question, "If I understand you correctly you are wondering whether their conclusion was supported by the testing that they conducted." Answer, "Well, I think it was supported....I think it would have been better to have more testing done." Question, "......they identify in the first long paragraph that (Student) has a developmental reading disability. Do you agree with that conclusion?" Answer, "Yes, I do." Question, ".....they indicate that (Student) has or meets the diagnostic criteria for Attention Deficit/Hyperactive Disorder, ADHD - predominately inattentive type. Do you agree with that conclusion?" Answer, "Yes, I concur. I suspected it when I tested (Student) initially but (Student) was in the first grade and I felt it was something that was worth monitoring." Question, "Have you looked at the recommendations for (Student's) program that was made by the National Jewish folks?" Answer, "I have, yes." Question, "Do you remember or are there any of those recommendations with which you strongly disagree, or with which you even disagree?" Answer, "No. I think they found phonological processing concerns. I don't know much about Lindamood-Bell, In fact, I know very little, so I can't really address what their method is you know....what their strategy is. Apart from the fact that I felt it was multi-sensory is pre-reading c phonical, phonological based. But they found again what I saw indications of when I tested (Student)...was that it was more than visual. It was also language based, which is the phonological processing. The recommended modifications with curriculum, recommended - yes, they recommended a lot of things I think that were in place."

When the Respondent was questioning Tamara Huntsman, the Special Education Teacher, that works with (Student), the Respondent asked the following: Question, (This was referring to the National Jewish Center report). "My question to you - that summation essentially describe (Student's) disability at least National Jewish's opinion about the disability that (Student) had. Do you disagree in any way with their conclusions?" Answer, "No, I agree with them." Question, "Were those conclusions consistent with what you were observing and working directly with (Student)?" Answer, "Yes." Later on in the Respondent's examination of this witness, the Respondent asked. Question, (Still referring to the National Jewish Center report). "Was this report considered during the Staffing?" Answer, "Yes." Question, "Is there anything in this National Jewish report that you believe is significantly inaccurate or wrong in regard to (Student)?" Answer, "No, I don't."

THE IHO FINDS: The District has accepted this independent evaluation performed by NJC as being an appropriate and valid evaluation and is obligated to consider this evaluation in developing the Student's IEP and subsequent program.

The question before the IHO is the Petitioner claim that the District failed to consider the results of this independent evaluation. (This directly relates to further claims of the Petitioner that IEPs developed in November, 1995 and May, 1996, were inadequate and inappropriate. ISSUE: A.b. & A.c.)

The Student had an IEP Annual Staffing in May, 1995. The District had in their possession by that time the evaluation and recommendations from NJC. The Petitioner selected only IEPs developed in November, 1995 and May, 1996, as being inappropriate and inadequate. However, as regards the Petitioner's claim that the District failed to consider the results of an independent evaluation, the IHO must also look at the IEP Review Staffing conducted on May 31, 1995, at the end of the Student's second grade (See Fact 15). As indicated (See Fact 12), the NJC administered a series of tests, and these were outlined and described in detail in the report. Tested area was spatial-constructional abilities, problem solving, memory and learning, attention. In the summary the report indicated that (Student) has a developmental reading disability, or dyslexia, and further, that (Student's) attentional difficulties meet the diagnostic criteria for Attention Deficit/Hyperactive Disorder, predominately inattentive type.

Seven paragraphs of recommendations followed in the report, and it is these recommendations the IHO reviews to determine if they were being considered when the District Staffing Team was preparing the Student's 5/31/95 and subsequent IEPs. Recommendation 1: "(Student's) reading disability requires individualized remedial instruction. Research suggests that formally structured, multi-sensory, phonics-based approaches are best effective for teaching dyslectic children to read and spell." The report goes on to describe some books and literature that would be appropriate for teaching (Student) and then "we have found the Auditory Discrimination In Depth (ADD) Program to be very useful for children of (Student's) age and ability level. If possible, individual tutoring by someone in the area that has been trained in one of these methods would be ideal. Another option would be to have (Student) participate in an intensive Lindamood-Bell workshop. An additional resource is a Colorado branch of the Orton Dyslectic Society. In addition to this specialized tutoring, (Student) will also benefit from continued remedial assistance (in both reading and math) in school, emphasizing a slower phonics-based approach." Recommendation 2: "Parents should read regularly to (Student) and include some books in which rhyme is emphasized." Recommendation 3: is a six-part recommendation, but in summary it suggests the Student's regular classroom teachers be made aware of the nature of (Student's) learning disabilities so they can make modifications in their curricular, which will maximize the development of (Student's) strengths without unduly penalizing (Student) for deficiencies. This goes on in five more paragraphs suggesting modifying the curricular in the various areas of need "using strategies that will not penalize (Student) for slowness or difficulties, including providing extra time for (Student) to accomplish some areas. Consultations with (Student's) tutor would be helpful in regard to writing requirements. If feasible, use of a computer would help (Student)." Recommendation 4: suggests that (Student) might benefit from stimulant medication. Recommendation 5: addresses external structures to assist (Student) in maintaining attention and organizing (Student's) work. Recommendation 6: deals with spatial difficulties and recognizes (Student's) verbal memory is an area of strength. Recommendation 7: "One of the most serious threats to the continued educational progress of learning disabled children is a sense of frustration and failure, which they often experience in school," and addresses the negative affect of these experiences. This Recommendation 7 is more of a summary and addresses the need for individualized services, special education personnel to be responsive to (Student's) needs and the need "to allow the Student experiences which will furnish success and allow (Student) to develop (Student's) strengths."

Recommendations made by the NJC deal with the Student's problems and are in two categories: 1) recommendations that were directed to the teachers or other personnel that were working directly with the Student in or during the school hours. 2) recommendations that might be considered external activities - the working with a tutor trained in certain methodologies and/or attending a Lindamood-Bell workshop.

The IHO reviewed the IEP of 5/31/95. There is no written or stated indication in the IEP that the NJC evaluation was observed, or considered. However, the special education teacher that worked with the Student during the second grade testified that she felt the programs that were being used in the special educational resource room and, in part, in regular education room were directly related to the recommendations made by NJC, particularly in providing (Student) with a curriculum that was more consistent with (Student's) ability to accomplish and in setting goals in line with the frustration level that was discussed in the NJC report. There was no recognition or discussion indicated in this IEP of the District considering supplying or developing a tutor, for the Student, familiar with the methodologies recommended in the report, and there was no suggestion of the Student attending any outside programs such as a Lindamood-Bell Center.

The parents testified that they considered sending the Student to the Lindamood-Bell program during the Summer, 1995, but felt the Student was unable to deal with such an intense program that particular summer (See Fact 17).

In the Fall, 1995, after the Student had entered the third grade, the parents met with school personnel and developed what was titled "Addendum to the IEP Report." This Addendum to the IEP indicated that goals remain the same, such as "improve reading," but the objectives were written in a more measurable manner. The special education teacher testified that she felt the goals as originally written in the IEP of 5/31/95, were adequate to meet the Student's needs and that the goals in the Addended IEP were written "to appease the parents". Both parents attended the meeting where this November, 1995, addended IEP was developed and both parents signed the document.(See Facts 18 & 19)

The IEP for the end of the third grade school year, dated 5/28/96, again does not refer directly to the NJC evaluation and makes no provision to provide a tutor or providing outside special services in the Lindamood-Bell process. Both the special education teacher and the school psychologist testified that they felt the goals and objectives in the IEP reflected appropriate teaching methods that were in place and they felt they were following the types of programs and methodologies that were recommended by NJC. The special education teacher referred to the SRA (Scientific Research

Association) program as being a phonics-based program and a multi-disciplinary program that was in use as recommended by NJC. (See Fact 20)

It is difficult for the IHO to evaluate the program that was in place under the direction of the IEPs to determine if it followed the NJC recommendations. It must be noted that the laws and statutes referring to the use of an evaluation do not say that the District has to follow implicitly the evaluation, only that it has to be considered along with other evaluations and documentation in developing an appropriate IEP for the student. However, those recommendations concerning modified curriculum and providing programming at the level of the Student to avoid the frustrations and concerns by the Student appear to be in place. It was the contention of the parent that the Student was being taught at a lower level, and this will be discussed in the Section on the Adequacies of the IEPs

As was noted (Fact 28) a person trained in the Lindamood-Bell system is available for consultation in the Telluride area. The Superintendent of Schools, Dr. Ann Brady, testified that she had made contact with this person through the parents, (the Petitioner in this case), found out that she was available and arranged for her to provide some training to the teachers in the area. This was confirmed by testimony by this Lindamood-Bell consultant, Linda Shepard. Training was given in the form of a week-long intensive training session and Superintendent Brady indicated that Linda Shepard would continue to provide clinical classroom support to the teachers in the form of daily follow-up training. This support apparently has not begun and the Superintendent indicated she was not sure why, but stated in her testimony that this support would be available, not only to the (student), the subject of this case, but to other students that might benefit from this program.

One recommendation that was contained in the NJC's report, "If possible individual tutoring by someone in the area who had been trained in one of these methods (this would relate to methods of formally structured multi-sensory phonic-based approach and/or the auditory discrimination in-depth approach) would be ideal. This will be discussed under the IEP category "Placement Alternatives Considered," as a related service. However, the IEPs format of this District do not appear to address related service unless it should come up under one of the other categories. Related services are discussed under 20 U.S.C.1401(17) and regulations Sect. 300.16a "as used in this part, the term Related Services means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education..... . Clearly tutoring, when appropriate, is a related service that would assist a handicapped child to benefit from special education.

Although the NJC Report was not specifically referred to in the formation of the Student's IEP of 5/31/95, 11/14/95 (Amended IEP Report) or the Annual IEP Report of 5/28/96, testimony, particularly of the school psychologist and the school special education teacher, show this NJC report was considered when the IEPs were prepared. The Petitioner offered no evidence to the contrary other than the testimony the Petitioner and his wife gave indicating dissatisfaction with the IEP and the progress their son was making. THE IHO FINDS: Recommendations of the Report that deal with educational and programmatic issues including the issue of protecting the Student's self-esteem and frustration level, were considered and many were incorporated in the development of the (Student's) IEP. The IHO is neither qualified nor responsible to make a recommendation about the programmatic content of an IEP, as regards the professional's interpretation of the recommendations of the NJC Report.

Regarding the issues that the IHO referred to as external recommendations of the NJC Report, the IHO relies on Fact 12 set forth herein above. The District has accepted the NJC Report as a valid evaluation to be considered in drafting the IEPs. Special Education Teacher for the District, the key player in preparing the IEPs, testified that she agreed with the recommendations in the NJC evaluation and report. The District's school psychologist, the Respondent's expert witness, testified that he agreed with all of the recommendations in the NJC evaluation and report. The IHO believes this witness and that this witness intended that his concurrence with the NJC evaluation and its recommendations included the recommendation for (Student) to participate in the Lindamood-Bell workshop and for individual tutoring by someone .... " trained in one of these methods." THE IHO FINDS: The District has not yet considered or extended to the Petitioner the balance of these NJC recommendations - the participation in a Lindamood-Bell workshop and the provision of a tutor "trained in one of these methods." (See Fact 12)

ISSUE: A.b., A.c. The Petitioner claims that the IEPs developed for (Student) in November, 1995 and May 31, 1996, were inadequate and inappropriate because they failed to include objectively measurable standards (goals and objectives set forth are inappropriate and inadequate).

REFERENCES:

A. The Board of Education v. Rowley stated in part herein above, 34 C.F.R. Part 300 Sect.300.346 Content of Individual Educational Programs.

B. Appendix C to IDEA, Part B Regulations, 34 C.F.R. Parts 300 and 301 Implementing 1990 and 1991 Amendments to the IDEA. Section 300.346 Content of Individualized Educational Programs set forth herein above and:

No. 36 : "The statement of present level of educational performance will be different for each child with disability, thus the determinations about the content of the statement for an individual's child are matters that are left to the discretion of the participants in the IEP meetings. However, the following are some points that should be taken into account in writing this part of the IEP: a: The statement should accurately describe the effect of the child's disability on the child's performance in any area of education that is affected, including academic areas (reading, math, communication, etc.)."

No. 37: "The Statutory Requirement for Including Annual Goals and Short-term Instructional Objectives, and for having at least an Annual Review of the IEP of a child with a disability provide a mechanism for determining (1) whether the anticipated outcome for the child are being met (i.e. whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these requirements provide a way for the child's teachers and parents to be able to tract a child's progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans."

No. 38: The annual goals in the IEP are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. As indicated (above) there should be a direct relationship between the annual goals and the present levels of educational performance.

No. 39: Short-term Instructional Objectives, also called IEP Objectives, are measurable intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals and can serve as milestones for measuring progress for meeting the goals.......

The IEPs, singled out by the Petitioner in this Issues A.b. and A.c., are the IEPs developed for the Student in November, 1995, shortly after the Student entered the third grade and, the IEP developed on May 31, 1996, when the Student completed the third grade. While the Petitioner set forth these as separate issues, the IHO will consider this review of both IEPs as one issue (See Facts 18 & 19).

In reviewing the various IEP forms presented in this case, the IHO notes that the form seems to have been revised from year to year and there is a lack of continuity in the format of the various IEPs. The cover sheets which were written by the facilitator, the school psychologist, are basically illegible, and the IHO has spent considerable time reviewing testimony and other documentation to determine what was actually entered on much of the front sheets to the IEP. The portions of the IEP that contained the goals and objectives were very legible, having been prepared by the special education teacher.

In considering this issue, the IHO looks first at the IEP developed in November, 1995, which was actually an amended IEP that relates to the IEP developed in May, 1995. The Staffing team, which developed this revised IEP, included both parents of the Student involved and both signed the attendance sheet for the IEP.

The form of this IEP contains five columns, headed - Goals, Objectives, Month, Goal Achieved, Modified or Continued, Reviewed By.

Reviewing the format under the heading - Goals: The first goal is titled "Improve Reading"; under Objectives: are three objectives - 1) When given a high first grade level "I can read book", (Student) will be able to read 100 words with no more than 20 errors by the end of October. 2) Given four comprehensive questions pertaining to the above reading (Student) will answer three out of four questions correctly. 3) When given the words he has read in a variety of different contexts (other books written, computer, chalk board) (Student) will identify 60% of the words with more than one syllable. In the third column, under "Month", which the IHO can assume to be the month in which this is to be accomplished, the first goal is September, the second goal is November, the third goal is November 14, 1995. Under the column "Goal Achieved, Modified or Continued" the first goal is "I can book" 12/100, comprehension 100%, identify words (Student) had read correctly. Under the second goal, read 97 words with nine errors - good comprehension. Under third goal, (Student) remembered - smiled, spots, started, witches, wind. There is some other unexplained reflection on reading of the third objective. The fourth column, "Reviewed by" and the name Tammy, Debbie, Bob and the names of the two parents. The other goals and objectives are in the same format, i.e. the goals are all stated as, such as - improve writing, improve math skills, improve spelling skills. The objectives appear to the IHO to be measurable. (The earlier IEPs gave an objective to accomplish but there was no date for when this needed to be accomplished, or no milestones along the period of instructions that would relate to the goals.)

When the IHO reviewed the May 1996 IEP, the IHO finds again the format has changed. Face sheet of the IEP that were prepared by the facilitator, (the school psychologist), are, again, basically illegible, and again the IHO had to depend on the transcribed testimony of several witnesses to interpret what was contained in the sheet titled "Present Level of Functioning, Achievement, and Performances." The pages of the IEP that contain the goals and objectives, again were written by the special education teacher and were very easily read. Annual Goals are placed at the top of each page below that are sections to provide for "Short-term Instructional Objectives." The next column, "Criteria and Evaluation Procedures to be Used." The next column, "Schedule of Achievement of Objective," and the next column, "Does Objective need to be carried over to new IEP, modified, or is it no longer appropriate." Goal is to improve reading skills. Short-term Objective No. 1 - given a mid second grade reading passage to read, student will be able to read 100 words, no more than five errors 90% of the time. (Student) will read with fluency and intonation on four out of five trials. Objective No. 2 - When given five comprehensive questions that are related to the above reading passage, (Student) will be able to answer four out of five 90% of the time, correctly. Under "Criteria and Evaluation Procedures," Objective No. 1 is informal measures; No 2. is sample observations. The schedule for achievement of the objective shows the beginning date of 5/96. There is nothing indicated under Target Completion Date or Actual Completion Date. The Special Education Teacher testified that this information would be entered as required in the fall of 1996.

The IHO now refers to the criteria for developing an IEP as set forth herein above, and taken from IDEA and the State Plan. The IEP for each child must include a statement of the child's present level of educational performance. When reviewing the two IEPs in question the statement of "present levels of functioning" is apparently intended to be included on a sheet with a bracket "educational information." This is the area that the IHO was unable to decipher, but it appears that the 11/14/95 IEP level of education is 1) " making progress with math operations"; 2) "writing" STD, ADP utilizing spelling words in sentences; 3) "Reading" STD changes - 2 books, 100 words; 4) "spelling" STD at least 10 words or are other notations that the IHO was unable to decipher. On the IEP of 5/28/96 under the Educational Performance are noted, math concepts and some other notations that were illegible; reading more fluently, still struggling, over one year behind in reading, writing despite struggles has improved on spelling tests; writing has gotten better. On this particular format used, under Educational Performance is an item of "concern" - still uses fingers for addition; substraction calculations and (undecipherable); (undecipherable) ... progressing; processes slower appears to be reading early second grade - comfort level; spelling and punctuation are poor. The IHO concludes from this that these statements are intended to meet the requirement of "a statement of the child's present level of educational performance" in Appendix 36.

Appendix C, No. 38 "The Annual Goals in the IEP are statements that describe when a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. ..... there should be a direct relationship between the annual goals and the present levels of educational performance." The IHO does not consider that "improve reading skills, improve writing skills, improve math skills, etc." meets the criteria.: "describe what a child with a disability can reasonably be expected to accomplish in a 12-month period in the child's special education program." No where does this set forth "a direct relationship between the Annual Goals and the present levels of educational performance."

While the objectives in these IEPs do give measurable steps they fall short of meeting the criteria of Sect. 300.346, Appendix C, No. 39, "Short-term Instructional Objectives are measurable, intermediate steps between the present levels of educational performance of a child with a disability and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the Annual Goals and can serve as milestones for measuring progress towards meeting the goals."

The District's Special education teacher testified that she believed the IEP developed in May, 1995, properly represented goals and objectives for the Student and that the amended IEP was developed "to accommodate the parents" who were displeased with the goals and objectives set forth in the IEP. It is obvious to the IHO, from testimony and exhibits submitted, that one or both parents attended all staffings involving (Student's) educational program and met often with District personal concerning (student). There is no question about the parents concern for (Student's) education.

The parents testified that they signed the IEPs indicating that they were in attendance and recognized what was being placed in the IEP. They repeatedly testified that they did not agree to the content of the IEP and in summation, the parent, (the Petitioner), made the argument that neither he nor his wife could be considered professionals in the education aspect of this and therefore could not be expected to recognize or develop educational performances of the IEP. The IHO considers this a valid statement. As such the parents must recognize recommendations of the professional educators. There was testimony during the course of this case that some personnel felt the parents were attempting to push the Student too hard and were partially responsible for the frustration the Student felt at being unable to achieve up to their expectations. The parents were cautioned against this in the NJC report, and if the parents (Petitioner) are to present the NJC report and recommendations as a standard for the District to use in developing an IEP program, the parents must apply the same standard to themselves. The IHO also notes that special education personnel and other District personnel are obligated to submit what they believe is their best professional opinion for the appropriate educational opportunities for the Student and not to acquiesce to the desires of the parents, if they believe their requests are inappropriate. The IHO believes that the regular education teacher, special education teacher, and the school psychologist, have certainly attempted to develop a program and instructional methods that would allow the Student to benefit educationally from (Student's) IEP.

Whether the goals and objectives are appropriate to meet the educational needs of the Student is not within the purview or scope of the IHO. The IHO can rule on this issue only to the extent the IEPs in question are "inadequate and inappropriate because it (they) failed to include measurable standards". As contained in the discussion above the IHO has tested the IEPs against the criteria set out in the Appendix C to IDEA, Part B Regulations. From the results of a finding in this respect the IHO will examine the issue of fape as judged under "Rowley".

THE IHO FINDS: The IEPs that are the subject of issues A.b & A.c. did contain objectively measurable goals and objectives, although they did not fully meet the standards of Appendix C to IDEA for preparing an IEP. The parents were present at all meetings and staffings concerning these IEPs and the shortcoming of the makeup and procedural portions of the IEPs did not impact the parents ability to input to the IEP process. The petitioner demonstrated during the DPH that the parents were more concerned with program and instruction methodologies than the ability to measure goal and objectives.

THE IHO FINDS: The deficiencies in the procedural structure of the IEPs, which are the subject of this issue, are not, in of themselves, sufficient to deny the student fape. The IEPs were appropriate as to the content of the program prescribed for the Student in that they reflect both the recommendations of the NJC evaluation and of the knowledge and experience of the professional staff of the District as it was able to deal with the Student's disabilities known to them at that time.

ISSUE A.d. Student was eligible for ESY in the Summer, 1995, and A.e. Student was eligible for ESY service for the Summer, 1996. The IHO will consider both of these under one discussion on the issues.

REFERENCE:

A. The criteria used in the past of considering regression and recoupment is no longer sufficient to determine whether a child on an IEP is entitled to extended school year services. Other factors must be considered, such as the probability of regression, the degree of the child's impairment, the parents' ability to provide education in the home, the child's rate of progress, the child's need for interaction with non-disabled peers, vocational training, the child's behavioral and physical problems, the availability of alternative resources and whether the requested service is extraordinary for the child's condition.
Johnson v. the Independent School District No. 4 of Busboy, Tulsa County, Oklahoma, 921 F. 2d. 1022, 17 IDELR 170 (U.S. Court of Appeals, 10th Circuit 1990).

B. The Reference Case set forth by the Respondent, Alamo Heights Independent School District v. State Board of Education is not considered in the ESY findings of the IHO. However, the IHO does consider the following: Reference: If a student benefits meaningfully from his or her IEP program, ESY is necessary only if " the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not covered by (ESY)." Cordrey v. Duckert 917F. 2d 1416 (6th Circuit 1990). As quoting from Alamo Heights case and Johnson v. Independent School as quoted herein above.

The IHO recognizes that most summer programs or extended school year programs are based on the assumption that the student would suffer "significant regression" should they adhere to the normal school year program. The IHO, also, recognizes in testimony given by both the special education teacher and the regular education teacher and documentary evidence submitted that (Student) often is unable to retain reading, spelling and writing skills beyond a few days unless (Student) consistently work with these skills. (Fact)The Student's IEP of 5/31/95, which would consider ESY for Summer, 1995, is checked "consider ESY referral - No." There is no further explanation of what tests, examinations or documents were used to determine if the Student would profit or would receive educational benefits from a summer program in 1995.

A document was submitted into evidence by the Respondent titled "Consideration for Extended School Year " and dated school year 95-96. This would be consideration for ESY for the summer of 1996 (See Fact 22). The document does not reflect a valid evaluation of the (Student's) needs or ability to recoup academically after a time break and does not examine the criteria of Johnson v. etc. referenced above. Students rate of progress was restricted, Degree of (Student) impairment was not addressed, as shown by the NJC report (Fact).

The parents of the Student testified that they were considering entering (Student) in the Lindamood-Bell program for 1995, but declined to do so because they felt (Student) was so "emotionally fragile that he could not endure such an intensive program and should be allowed to just enjoy the summer" (See Fact 17). This suggested to the IHO that had the District offered an ESY program for the summer of 1995 the parents would have declined to take advantage of this program.

In the Summer,1996, the Student's parents (Petitioner) placed (Student) in the Lindamood-Bell program in California for four weeks (See Fact 23). The IHO takes the Petitioner's claim of Item A.e to suggest that the Lindamood-Bell program should replace an ESY program that the District should have offered to the student and therefore the District should reimburse the Petitioner for the cost of the Lindamood-Bell program.

The District psychologist testified under questioning by the Respondent, that the District may or may not offer ESY depending on the needs of a special education student. The school psychologist was questioned by the IHO and asked "In your evaluation or working with (Student) do you find or does (Student) have any state of regression when not in a class for a period of time?" Answer, "To be honest, I don't measure it, but based on what I'm told, and based on ......the evaluation is informal or curriculum based by the Staff and the resource teacher, it looks like (Student) is making sufficient progress that there is sufficient recoupment over the summer."

There is every indication that the District used only the classroom teachers and special education teacher's observations to determine the Student's possible regression over the summer period and the document submitted into evidence discussed herein above, indicates that such examination of the Student's regression were at best subjective and there was no real foundation or testing done that was provided by the District to indicate that any other standards or factors were judged in determining if the Student would benefit from or require ESY.

Testimony given by the second and third grade teachers and the special education teacher continued to refer to inconsistencies in the Student's performance. In testimony it was brought out that in spelling (Student) could memorize a list of spelling words and would pass a test 90 to 100 percent, but in a few days would be unable to pass the test. Similar problems occurred in (Student's) other subjects and indicates that the Student did demonstrate some types of regression. Using the standards set forth herein above, it is obvious to the IHO that the Student's rate of progress no only was not what the parents expected or desired, but was at a rate far below (Student's) classmates. The goals and objectives set forth in the Student's IEPs also indicate inconsistent progress in many of (Student's) needs, and inconsistencies in (Student's) level of performance. Lacking any documented evidence from the District that demonstrates the Student would not benefit from ESY and based on the evidence referred to and the testimony referred to, the IHO concludes the Student would benefit ,and would have benefited, from ESY for the Summer, 1995 and 1996, and therefore, is eligible for ESY for those summers.

Obviously, we can not recapture the summer of 1995. Also, the parents have testified that they did not feel that the Student would have been able to handle any additional programming for that summer and they had decided to let (Student) take the summer off and as they put it "just be a boy." Therefore, the IHO will not award compensatory time for the summer of 1995.

The District did not offer program to the Student for the summer of 1996 and according to testimony by the school psychologist there was no available program in the summer of 1996. The ESY evaluation chart (See Fact 22) does not demonstrate comprehensive evaluation of the Student's need to receive ESY for the summer of 1996. The IHO, as pointed out herein above, finds that the District accepted the recommendations of the NJC Report and one of those recommendations was that the Student could benefit from a program such as the Lindamood-Bell Processing Program. The parents of the Student took it upon themselves to enroll the Student in this high intensity program for 4 weeks in the summer of 1996, and the IHO considers this an appropriate replacement for the ESY program the District should have provided, and will award the Petitioner compensation in that form.

THE IHO FINDS: The Student was eligible for ESY for the summer of 1995. The Student was not available to accept ESY placement for 1995 and the IHO will not award ESY compensatory time or services for the summer of 1995.

THE IHO FINDS: The Student was eligible for ESY for the summer of 1996. The IHO will award reimbursement to the Petitioner for the cost of the Lindamood-Bell Program as ESY compensatory time and services for the summer of 1996.

Petitioner claims A.f.: Parents are entitled to reimbursement for cost of private tutoring since early 1995.

REFERENCE:

A. .... parents may be awarded reimbursement of costs associated with an unilateral placement if it is found:

a. the school district's IEP is not appropriate:

b. the parent"s placement is appropriate

c. equitable factors may be taken into consideration. (see B.G. v. Cranford Board of Educ.) Burlington, MA v. Dept. of Education et al. 105 S.Ct. 1996, IDELR 556:389 (US 1985)

Burlington, MA v. Department of Education *et al.*, 105 S.Ct. 1996, IDELR 556:289 (U.S. 1985).

B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard. Florence County School District Four *et al.* v. Carter, 114 S.Ct 361, 10 IDELR 532 (U.S. 1993).

C. Student progress at a unilateral private placement has no bearing on weather the School District must reimburse the parents for its costs. The District need only show that it"s program offered through the IEP confers some educational benefit.
Kerkam v. D.C. Public Schools, 931 F.2nd. 84, 17 IDELR 808, U.S. Ct. of App. D.C. (1991)

D. CDE State Plan for FY 1995-97 under Part B of IDEA, Section XII Participation of Private School Children Placed by Their Parents. XIII. Placement in Private Schools by the Administrative Unit or Other Public Agencies.

E. 34 CFR Sect. 300.348 and 300.349

The Petitioner had (Student) evaluated at NJC in January, 1994, and ,as established by the IHO, the District accepted that evaluation along with the recommendations of the NJC Report. One of the recommendations was "If possible, individual tutoring by someone in the area who has been trained in one of these methods (Dyslexia: Theory and Practice of Remedial Instruction or Auditory Discrimination in Depth) would be ideal. (See Fact 12). Based on this recommendation, the parents testified that they secured the services of a tutor in early 1995. This person, Megg Lynch, continued to work with the Student during the balance of that school year, in the summer of 1995, and through the 1995-96 school year. The District's regular education teacher and the special education teacher were aware of this tutor's work with the Student and on several occasions met with her and discussed appropriate strategies. This party that worked with the Student was not available to testify during the hearing.

The Petitioner offered no documentation demonstrating this tutor's qualifications and could only state through testimony that Megg Lynch had, they believed, some experience with special education children and indicated that she worked very well with the Student. Nothing was offered into evidence, either in documentation or through testimony, to indicate that the District had recommended, or agreed to, or suggested this person to tutor the Student. Nothing was offered into evidence to indicate that this person had any experience or qualifications in the areas recommended by the NJC Report, and the Petitioner made no claim that she was skilled or trained in any of these disciplines. Also, nothing was entered into evidence or claimed by the Petitioner that she had been trained in the Lindamood-Bell process. Nothing was brought in through evidence or testimony that this tutor was assigned or written into any of the IEPs for the Student, or any indication that the District would accept the responsibility for payment of this tutor.

The document submitted into evidence by the Petitioner to substantiate and verify that the Petitioner had paid Megg Lynch for services performed was in the form of a transaction report drawn from the Petitioner accounting files. This report listed the services performed as "child care." The Petitioner testified that Megg Lynch performed as a tutor for the student and did not explain why she was paid under the category - "child care."

The IHO does not dispute that referenced party may have been beneficial to the educational process of the Student; however, she did not meet the required recommendation of the NJC Report, was not identified as a "related service" in any of the IEPs, and the Petitioner did not offer substantial evidence to demonstrate that this tutoring by Megg Lynch was necessary to meet the Student's educational needs. No documents were submitted into evidence to show the type or format of the educational program Megg Lynch was providing, or the amount or rate of progress the student was achieving in this program. The Respondent denies that the District is responsible to reimburse the Petitioner for the cost of this tuition, and the IHO will find in favor of the Respondent.

As part of this same claim, A. f., the Petitioner is requesting the District to reimburse the Petitioner for the cost of "continuing private tutoring." Linda Shepard, who was certified as a expert witness for Petitioner and who testified that she was trained in the Lindamood-Bell process, had worked for over twelve years training and working with disabled students using the Lindamood-Bell process services, was engaged by the Petitioner in September, 1996, to "tutor" (Student) in the Lindamood-Bell process. The Petitioner, as parents, testified that the Student was working with this "tutor" for approximately one and one-half hours a day and the balance of the time the Student was attending regular classes in the District. Respondent, after questioning Linda Shepard as a witness, did not deny that she is a certified technician in the Lindamood-Bell teaching process, and the IHO finds that she meets the qualifications of the NJC Report recommending a tutor skilled in certain processes.

In May, 1996, the District personnel met with the parents and drafted an IEP, which both the District and the parents signed, which placed the Student in the District's regular education classes with resource services (approximately 1&1/2 hours a day) by the Special Education Department of the District. The parents testified and the District confirmed that the District and the parents had been meeting since the beginning of the current school term in September, 1996, in an attempt to develop a new or amended IEP to meet the educational needs of the Student. Therefore, the current IEP developed in May, 1996, is the Student's present educational placement. Refer to C.F.R.300.513 (a). During the pendency of any administrative or judicial proceeding regarding a complaint unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her educational placement. Refer, also, to 20 U.S.C. 1415 (e) (3) and CDE State Plan for implementation of IDEA, Sect. VII Paragraph 12, Interim Enrollment.

The Student is, therefore, still enrolled in special education under the program provided in the IEP developed in May, 1996. The District as stated herein above, have engaged the services of Linda Shepard to present a workshop for their teachers and to engage this person on a consulting basis to work with their teachers to implement in the District Special Education Unit some or parts of the Lindamood-Bell process. (See Fact 28). The District claims in their testimony they are prepared to offer the Student an appropriate educational program, including special education, for the school year 1996-97. The parents while enrolling their school in the regular school program have not entered into the special education program for the 1996-97 year, and, therefore, cannot demonstrate the program the school is offering is inappropriate since they have not tried the program and did not submit any documentation to the Hearing Officer that described what the program would be, and if the program would or would not meet the recommendations of the National Jewish Center report or the Lindamood-Bell evaluation report that was developed in the summer of 1996. Further, the Petitioner did not show when presenting his case that the school would not provide the services of Linda Shepard in some manner, either directly or through the other teachers, for the 1996-97 special education school year.

The Parents (Petitioner) chose to withhold (Student) from the special education portion of the educational process covered by the IEP, and place the student in a program conducted by Linda Shepard (Fact 27). This constitutes a "unilateral placement," by the parents, in a private program operated by Linda Shepard, without the concurrence of the District.

Linda Shepard is not certified by the State of Colorado as a special education teacher. This in of itself does not disqualify her from providing services under certain conditions (See Ref. B - above) However, an appropriate IEP has not been developed placing the Student in this facility. (C.F.R. 34, 300.348, (a) (1) (2).) Further, this unilateral placement does not meet the standards set forth in CDE State Plan, FY 1995-97, as referenced above.

THE IHO FINDS: The District is not responsible for reimbursing the Petitioner for the tutoring provided by Megg Lynch.

THE IHO FINDS: The District is not responsible for reimbursing the Petitioner for the services provided by Linda Shepard until and unless such services are incorporated into the Student's IEP.

DECISION AND ORDER OF THE IMPARTIAL HEARING OFFICER

CASE NO. L96:115

1. ISSUE A: The Petitioner claims that the Respondent, Telluride School District, R-1, has not provided and does not now provide free appropriate public education (fape) supported by written IEP that meets (Student's) "unique" needs. Petitioner claims as follows:

A. a. The District failed to consider the results of an independent evaluation.

The IHO finds for the Respondent, in part : The Respondent did consider the results of an independent evaluation conducted by NJC January , 1995, and implemented many of the programmatic recommendations from this independent evaluation.

The IHO finds for the Petitioner in part: District failed to consider and implement recommendations from the NJC independent evaluation that the Student would benefit from an intensive program in the Lindamood-Bell system and would benefit from tutoring in specified educational disciplines.

A. b. The IEP developed for (Student) in 1995, was inadequate and inappropriate because it failed to include objectively measurable standards (goals and objectives set forth are inappropriate and inadequate).

A. c. The IEP developed for (Student) on May 31,1996, was inadequate and inappropriate (because it failed to include objectively measurable standards) (goals and objectives set forth are inappropriate and inadequate).

The IHO finds for the Respondent in part: The Respondent did develop measurable objectives in the IEPs.

The IHO finds for the Petitioner in part: The IEPs were not inappropriate and inadequate, but were lacking specificity in the goals and did not fully meet requirement for detail. This does not constitute a failure by the District to provide fape to the Student.

A. d. Student was eligible for extended school year services (ESY) for the summer of 1995.

A. e. Student was eligible for ESY services for the summer of 1996.

The IHO finds for the Petitioner. Extended school year services were not appropriately evaluated or considered. The Student would not have been available in the summer of 1995, and compensatory services will not be awarded. The Student was entitled to ESY for the summer of 1996, and the IHO finds the Lindamood-Bell Remedial Clinic is appropriate compensation.

A. f. The parents of (Student) are entitled to reimbursement for the cost of private tutoring since 1995. The IHO finds two claims under this issue:

1. The Petitioner requests reimbursement for the cost of private tutoring since January, 1995, through and into mid-year of 1996: The IHO finds for the Respondent. This tutor was not written into an IEP and did not meet the criteria of NJC recommendation. The IHO denies the Petitioner's claim for reimbursement.

2. The Petitioner requests reimbursement for the cost of a private tutor from September, 1996, to the present. The IHO finds for the Respondent. Placement with this tutor constituted a unilateral placement by the Petitioner. This tutor/service was not incorporated in the Student's IEP and does not meet the standards set forth in the CDE State Plan. The IHO denies the Petitioner's claim for reimbursement.

A. g. The parents of (Student) are entitled to reimbursement for the cost of (Student's) participation in the Lindamood-Bell remedial reading program during the summer of 1996. The IHO finds for the Petitioner. The Lindamood-Bell Program is an appropriate compensation for the ESY program denied the (Student) in the summer of 1996. The Petitioner provided appropriate documentation showing the Petitioner had paid the Lindamood-Bell Clinic $3,499.00 for this program and IHO will order the Respondent to reimburse the Petitioner in this amount. The IHO awards no travel or living expenses to the Petitioner while attending this program.

2. ISSUE B. Petitioner requests relief in this matter as follows:

B. a. The Telluride School District R-1 be directed to reimburse the Petitioner for the cost of private tutoring which began during 1995 and has continued on to the present in the amount of approximately $3,000.00.

The IHO denies the Petitioner's request.

B. b. The Telluride School District R-1 be directed to reimburse the Petitioner for the cost of the Petitioner's attendance at the special Lindamood-Bell Remedial Reading Program during the summer of 1996, in the approximate amount of $3500.00.

The IHO awards the Petitioner $3,499.00 in accordance with Petitioner's accounting records.

B. c. The Telluride School District be directed to reimburse the Petitioner for the cost of continuing private tutoring at a cost to be determined.

The IHO makes no award in this issue. Private tutoring and the cost thereof would be the subject of appropriate related services developed in a 1996-97 school year IEP for the Student.

ORDER of the IHO:

1. No later than January 31, 1997, The District will reimburse the Petitioner $3,499.00, as payment for the Lindamoo-Bell program awarded to the Petitioner in lieu of the ESY the Repondent failed to provide the Student in 1996.

2. The District/SWBOCS, will review the IEP format and the procedures for developing an IEP to bring the IEP document and procedures into compliance with IDEA and CFR 300, Part B, Appendix C.

3. No later than January 31, 1997 (unless a later date is mutually agreed to by parents and District), the District will offer to hold an IEP Staffing with the purpose of developing an IEP for the Student, for the school year 1996-97. The Staffing shall include such SWBOCS and District personnel, the parents, and such other persons as necessary to develop an IEP that will address the unique needs

of the Student and to provide the Student educational benefit. The IEP Staffing shall include, but is not limited to, consideration of:

> The NJC evaluation report and the Lindamood-Bell recommendations.
>
> Extended School Year during 1997 for the Student.
>
> Need for an independent educational evaluation of the Student.
>
> Need for related services and supports to meet the Student's unique needs (related services may include provisions of a private tutor in accordance with the recommendation of the NJC Report and or placement in a program outside of the District's Special Education Department).
>
> In developing the IEP, the Staffing Team shall review and adhere to the IEP requirements of CFR 300, Part B, Appendix C.

4. This is the final decision of the Impartial Hearing Officer in the matter of Case No. L96:115. The decisions and orders herein are authorized by the CDE State Plan, FY 1995-97, Sect. VII.

5. This hearing was conducted under the authority of the Colorado Department of Education in accordance with the policy set forth in CDE State Plan, FY 1995-97, Sect. VII.

6. The parties have the right to appeal this decision in accordance with the CDE State Plan, FY 1995-97, Sect. VII.

A complete copy of the appeal procedures as set forth by CDE State Plan, FY 1995-97, are attached to this decision.

Dated in Denver, Colorado, this December 13, 1996.

William F. Muth
Impartial Hearing Officer

I, the undersigned, William F. Muth, Impartial Hearing Officer for Case No. L96:115, certify that I have delivered by electronic transmission, placed in the U.S. mail or handed to the, following a true copy of the findings and decisions in this matter, on 13th day of December , 1996.

William F. Muth
Impartial Hearing Officer

1. Petitioner (1 copy)

2. Ann M. Brady, Superintendent, Telluride School District R-1,
   PO Box 187, Telluride CO 81435-2280(2 copies)

3. Miller, DeLay and Crabb, P.C., Attorneys at Law
   2008A W. 120th Ave., Westminster CO 80234-2421
   ATTN: Kenneth A. DeLay (1 copy)

4. Colorado Department of Education, Special Ed. Services Unit
   201 E. Colfax Ave., Denver CO 80203-1704
   Attention: Fred Smokoski: Director (2 copies)
   ATTN:

8. Procedure for appealing decision of impartial hearing officer.

   a. Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

      (1) A notice of appeal; and

      (2) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

   b. Simultaneous with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Colorado Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

      Within five days of receipt of a notice of appeal, any other party may file a cross-appeal.

   c. The notice of appeal shall contain the following:

      (1) The caption of the case, including case number and names of all parties.

      (2) The party or parties initiating the appeal.

      (3) A brief description of the nature of the case and the order being appealed.

      (4) A list of the issues to be raised on appeal.

      (5) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

      (6) A certificate of service showing the date the copy of the notice of appeal was mailed to the Colorado Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

   d. A notice of cross-appeal shall contain those items listed in VII., B, 8, c, (1) - (4) above along with a certificate of service.

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e. At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

f. Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative hearings a designation of any additional portions of the transcript which that party believes are necessary for resolution of the appeal.

g. Whichever party appeals the decision shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

   (1) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record..

   (2) Immediately upon filing any additional designations pursuant to Section VII., B., 8., F. any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

   (3) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parents shall not be required to pay for the cost of a copy of the tape recorded record for an appeal. The transcript or portions thereof sha[illegible] made available to any party at reasonable times for inspection or copying at the copiers expense.

h. Upon receipt of the notice of appeal, the Administrative Law Judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the Administrative Law Judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits, and the decision of the impartial hearing officer.

9. State level review procedures.

   a. Unless otherwise ordered by the Administrative Law Judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

   b. In conducting a state level review the Administrative Law Judge shall:

      (1) Examine the transcript and certified record received from the impartial hearing officer.

      (2) Seek or accept additional evidence, if needed.

      (3) Afford the parties an opportunity for oral or written argument, or both if appropriate, at a time and place reasonably convenient to the parties.

      (4) Determine and assure that the procedure at the hearing before the impartial hearing officer was in accordance with the requirements of due process.

      (5) Make a final and independent decision and mail such to all parties within 30 days of the filing or mailing of the notice of appeal.

   c The Administrative Law Judge may grant specific extensions of any of the timelines once a timely appeal has been received at the request of either party.

   d. In connection with the state level review, the parties shall have the following rights:

      (1) To be accompanied and advised by counsel and by individuals with special knowledge with respect to the problems of children with disabilities.

      (2) If further evidence is to be taken, to present evidence and confront, cross-examine, and compel the attendance of witnesses.

      (3) To prohibit the introduction of any evidence through witnesses or documents at the hearing if the witness has not been identified or the document has not been disclosed to that party at least five days before the hearing.

(4) To obtain a written or electronic verbatim record of the hearing.

(5) To obtain a written determination upon state level review, including written findings of fact and a decision.

e. In connection with any hearing that is part of the state level review, parents shall have the following additional rights:

(1) To have the child who is the subject of the hearing present.

(2) To open the hearing to the public.

f. The Colorado Department of education, after deleting any personally identifiable information, shall:

(1) transmit the findings and decisions to the State advisory committee, and

(2) make those findings and decisions available to the public.

10. Appeal of decision on state level review.

a. A decision made upon a state level review shall be final except that any party has the right to bring a civil action within 30 days in an appropriate court of law, either federal or state.

Case No.: **S96:115**

Status: State Level Review

Key Topics:
Free Appropriate Public Education (FAPE)
Individual Education Plan (IEP)
Independent Evaluation
Extended School Year (ESY)
Unilateral Placement

Issues:
- Whether the District improperly failed to consider the recommendations of the NJC evaluation regarding the Lindamood-Bell system.
- Whether the District was required to implement all of the recommendation of the NJC evaluation.
- Whether the Student was qualified to receive ESY for the summer of 1996.
- Whether the program attended by the Student in the summer of 1996 was the ESY for which he was qualified, if any.
- Whether Petitioner is entitled to reimbursement for the Student's unilateral placement in the Lindamood-Bell program for the reasons found by the IHO.
- Whether Petitioner is entitled to reimbursement for the cost of the Student's participation in the Lindamood-Bell program in the summer of 1996 in the amount of $4,363 rather than the $3,500 found by the IHO.
- Whether Petitioner is entitled to reimbursement for the cost of tutoring services.
- Whether the IEPs developed for the Student in 1995 and 1996 were adequate and appropriate.
- If the IEPs were not adequate or appropriate, the appropriate remedy therefor.
- Whether the District is required to provide continuing tutoring or other special education services by someone trained in one of the methods suggested by NJC.

Decision:
- The IEPs developed for the student in 95 and 96 were adequate and appropriate.
- The district properly considered the recommendations of the NJC evaluation regarding the Lindamood-Bell system and was not required to implement all of the NJC recommendations.
- Petitioner did not establish eligibility to receive ESY services and therefore the District is not required to reimburse Petitioner for unilateral placement.
- Petitioner is not entitled to reimbursement for the tutoring services incurred prior to the due process hearing.

Discussion:
- IHO conclusions.

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 97-01 S96:115

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER:

TELLURIDE SCHOOL DISTRICT R-1,
ANN BRADY, SUPERINTENDENT,
Appellant,

v.

[redacted] **by and through his parent** [redacted]**,**
Cross-Appellant.

This proceeding is a state level review of the decision of an impartial hearing officer under the Individuals with Disabilities Education Act , 20 U.S.C. Sections 1400 *et seq*. ("IDEA"); the Colorado Exceptional Children's Act ("ECEA"), Sections 22-20-101 *et seq*. and the Colorado Department of Education Fiscal Years 1995-97 Fiscal Plan ("State Plan").

A local level evidentiary hearing was held before an impartial hearing officer ("IHO") on November 5, 6, and 7, 1996. [redacted] ("Petitioner") appeared *pro se* on behalf of his son [redacted] (the "Student"). Telluride School District R-1 (the "District") was represented by Kenneth A. DeLay, Miller, DeLay & Crabb, P.C. The IHO issued a written decision on December 13, 1996. The District filed an appeal of the IHO decision on January 17, 1997. The Petitioner filed a cross-appeal on January 24, 1997. The parties filed briefs on February 18 and 26, 1997. The District filed a reply brief on March 5, 1997, at which time the matter was ready for decision. The parties have waived the time limits set forth in the State Plan and federal regulations with respect to this state level review, with the understanding that the decision would be rendered expeditiously.

SCOPE OF REVIEW

Pursuant to the IDEA, ECEA and the State Plan, on state level review, the Administrative Law Judge must conduct an impartial review of the IHO decision and make an independent decision. 20 U.S.C. §1415(c); 34 C.F.R. §300.510; State Plan, Part II.A.VII.B.9.b; and 2220-R-6.03(11)(b)(v), 1 CCR 301-8. The Administrative Law Judge is permitted to seek and accept additional evidence, but has determined in this case that no additional evidence was necessary in order to decide the case. 20 U.S.C. 1415(e)(2).

In conducting a review, the Administrative Law Judge must give "due weight" to the findings of the IHO below. *Union School District v. Smith,* 15 F.3d 1519, 1524 (9th Cir.), *cert. denied,* 115 S. Ct., 428 (1994); *see, also, Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206 (1982) (*"Rowley"*). Reviewing courts have the discretion to determine the appropriate weight to be given to the findings below. *Town of Burlington v. Department of Education, Commonwealth of Massachusetts,* 736 F.2d 791 (1st Cir. 1984), *aff'd on other grounds sub nom School Committee of the Town of Burlington v. Department of Education, Commonwealth of Massachusetts,* 471 U.S. 359 (1985) (*"Burlington"*).

FINDINGS OF FACT OF THE IHO

The parties do not appear to dispute the basic factual findings of the IHO decision. Rather the disputes concern the conclusions reached by the IHO, some of which are claimed by one party or the other to be either contrary to the evidence or a misapplication of the law to the evidence. The Administrative Law Judge has reviewed the record and the IHO decision and has found that the IHO's findings of fact are supported by substantial evidence. The Administrative Law Judge substantially adopts the factual findings of the IHO in this case; those findings are set forth below. The Administrative Law Judge has clarified some of the IHO's findings and has made additional findings consistent with a review of the record before the IHO. The ultimate findings of fact are those of the Administrative Law Judge.

FINDINGS OF FACT

1. The Student, a nine-year, eight months old male at the time of the due process hearing, resides with his natural parents in the District in Telluride, Colorado. The Student's parent is the Petitioner in this case on behalf of the Student.

2. The Student entered kindergarten in the District in the Fall of 1992 and completed the kindergarten session in the Spring, 1993. The Student exhibited behavioral and emotional problems during the kindergarten session.

3. In September, 1993, the Student enrolled in the District as a first grade student. In the Fall, 1993, in the months of October and November, a building level meeting was scheduled which required the completion of certain information concerning the Student. In part, the information used for this "screening" consisted of a Student Screening Scale (authored by the Student's first grade teacher), which noted the Student's academic under-achievement and checked off: readiness skills delayed; reading skills delayed; handwriting skills poor; spelling skills deficient; classroom seat work unsatisfactory; and slow disabled learner.

4. The teacher also completed a Speech and Language Communication Checklist, which noted among other concerns that problem areas for the Student were:

unable to follow teacher's oral directions; has short attention span; unable to ask for clarification; sometimes appears not be listening; appears not to remember and/or understand what has been said. Under "Expressive Language" the teacher noted: appears to grope or struggle for words; uses a limited speaking vocabulary, and a problem in using appropriate volume pitch and intonation.

5. The Education Progress Report submitted by the first grade teacher (undated) noticed, "I need to understand better how [Student] sees words. I need strategies to change assignments so [Student] may be successful, raise confidence."

6. Another Progress Report, submitted by the classroom teacher and a specials teacher noted under: "What Does This Child Have Problems Doing": "sitting still and concentrating on one activity for more than ten minutes...[Student] is distracted by everything around him. Peer contact is his priority."

7. The document titled Cognitive Processing Skills checklist noted under the category Speed of Processing that Student was "slow" in the following: perceiving or working with visually based information; perceiving or working with auditory and language based information; problem solving; and offering an oral response when asked.

8. This cognitive processing document also indicated problems in the areas of problem solving, organizing and planning, strategic thinking, self-monitoring, and difficulties with short-term and with long-term memory.

9. Under date of December 2, 1993, one parent signed a consent form for the Student to be evaluated to determine whether or not Student would be considered handicapped as defined in the Federal and State rules and regulations, and would need special services in order to receive an appropriate education. The form stated the evaluations would be done by persons who have special training to evaluate and identify student needs. The assessed areas of functioning might include the following: physical, education, communication, psychological, social.

10. On January 17, 1994, an in-depth psychological evaluation was performed by the Telluride school psychologist, Bob Eberle. The psychologist's assessment included the WISC-III testing of the Student's intellectual ability and the Burks Behavior Rating Scale evaluating the Student's behavior. The psychologist's report identified "a very significant concern with poor academics." Other significant concerns were with "excessive withdrawal, poor ego strength, poor intellectually and poor attention." Mr. Eberle found that the Student had average intellectual ability but may have a genetic disposition towards reading difficulties. Attention issues at that time appeared more reflective of maturational delay than a possible attention deficit disorder. Mr. Eberle stated that the Student would be monitored over the course of the next several years to see whether or not an attention disorder exists. Testing was also performed by a special education teacher. Comments from this teacher noted that the Student's reading and word recognition level was 1.3 and his math level was 1.6; she made no comment on the level of his writing. In this teacher's

opinion, the Student was functioning in reading and math at approximately the correct level.

11. Persuasive evidence by educational professionals who testified at the hearing was that children, even those who do not have a disability, have a range of "normal" in terms of the educational "level" at which they are functioning during the kindergarten through at least the third grades.

12. A meeting was scheduled with District staff and the Student's mother in January, 1994. The assessing team recommended no placement in special education. The results of this assessment were

a. Educational - the Student was functioning at approximately the mid-first grade level and needed to learn letters and sounds.

b. No significant physical needs were noted.

c. Communication- in classroom doesn't participate verbally often. No expressive language or processing concerns. Needs were noted - give time and space to feel comfortable, communication encouraged.

d. Psychological- it was noted that the WISC-III Test indicated average intelligence; significant weaknesses: mental math computation, non-verbal inductive reasoning, poor academics and poor attention. Among the Student's needs were to monitor attention span and improve self-esteem.

13. A Progress Report was issued by the first-grade teacher covering the School Year 1993-94 and signed by the mother of the Student for the first quarter and the second quarter (all of the four quarters were included in the school year and were filled in). In each area and significantly in reading, writing, spelling and math, the Student had received marks of satisfactory, very good and excellent. The Student was promoted to the second grade.

14. The Student entered the second grade in September, 1994.

15. The parent of the Student signed a document "Approval for Temporary/ Diagnostic Placement," dated September 25, 1994, for a temporary placement of 20 school days in a resource program. This document was signed by the special education teacher on October 25, 1994.

16. A form indicating permission to place the Student in a special education program was dated November 21, 1994. The primary handicap condition was indicated as P.C. (perceptual communication); a secondary handicapping condition was speech. Services were to be delivered in the Resource Room. The "Resource Room" was staffed

with a special education teacher. There were from one to perhaps four students in the room, thus each was able to have individual attention tailored to that student's needs.

17. On November 28, 1994, a Staffing was held to develop an individualized educational plan ("IEP") for the Student. The staffing team consisted of both parents, the speech and language pathologist, the second-grade classroom teacher, a special education educator, and the school psychologist. This IEP was developed based on the input from the staffing team as set forth in a two-page document that preceded the pages containing the goals and objectives of the IEP. This two-page document indicates problems with handwriting, focusing in class, and resistance.

a. Educational Needs of the Student were to improve in all academic areas. His current functioning was assessed as: reading, first-grade level; math, first-grade level; spelling, modified for second grade.

b. Communications Need: to improve classroom performance.

c. Psychological Need: to improve attention skills.

d. Social Need: to improve self-esteem.

18. The group determined that the Student was not able to receive reasonable benefit from only ordinary education. The Student met the criteria for handicapping/disabling condition of "P.C.- Reading disability- written language." The recommended placement in the least restrictive environment was regular education with resource intervention. The rationale for this placement was the Student's significant weakness with reading and written language. One of the reasons for the staffing meeting, as checked on the assessment form, was to consider an extended school year ("ESY"). The form reflects that there was no referral for ESY; the form had the written notation "collecting data."

19. A three-page IEP was developed, containing the following information.

a. Reading: Goal-improve reading skills; objective- when given a first-grade passage of 60 or more words Student will be able to read with 80 percent accuracy and when given the same words he read correctly in a different manner he will remember 50 percent.

b. Writing: Begin and end the assignment within a set time. Student will be able to write at least three sentences using correct punctuation with 90 percent accuracy.

c. Math: Goal- improve math skills; objectives- (1) when given ten addition problems with or without carrying one or two digits, Student will be able to get 80 percent correct. (2) Student will complete 10 addition or subtraction problems within 10 minutes; (3) Student will successfully complete 8 out of 10 subtraction problems.

d. Comprehension: Goal- improve comprehension skills. Objective- after reading aloud or being read to the Student will be able to correctly answer 3 out of 5 questions related to the material.

e. Communication: Goal- develop classroom communication skills. Objectives- ask teacher for help once per day, contribute to class discussion once per day, using a logical sequence of ideas to tell a story.

f. The date required to accomplish these skills is not legible on the document submitted to the IHO.

20. On December 2, 1994, one of the Student's parents signed a document entitled "Statement of Parental Rights." These rights were also included on various other documents of consent submitted in the process of placing this child in special education services. This issue of the parents being aware of or properly informed of parental rights was not brought forward in this case and is not considered an issue.

21. On January 4, 1995, the parents arranged to have a neuropsychological evaluation performed at the National Jewish Center for Immunology and Respiratory Medicine ("NJC") for the Student, who at that time was seven years old and attended the second grade in the District. NJC is recognized as a leader in the field of performing this type of evaluation.

22. The NJC issued a report (the "NJC Report") setting forth in detail background information, tests applied to the Student, results of these tests, and a number of recommendations.

23. The NJC Report indicates that the NJC administered fourteen individual tests, including the WISC-III intelligence test and the Gray Oral Reading Test. Test results indicated and confirmed that the Student was currently functioning in the average range of intelligence. The NJC Report stated "[Student's] individual sub-test scores revealed some patterns of variations that are important to note. Within the verbal scale, [Student] exhibited a significant weakness on the arithmetic sub-test, which measures knowledge of numerical operations as well as concentration and attention. Qualitative observations during this subtest indicated that [Student] was having difficulty holding the questions in working memory long enough to perform the math calculations." The Student's strong performance on some tests suggest that his perceptual reproduction and non-verbal deductive reasoning skills (working from a whole to parts) were significantly better developed abilities than were his other perceptual organization and processing speed skills.

24. When tested for academic achievement, the Student was graded from middle first grade to nearly second grade level on most applications with the exception of the Gray Oral Reading Test- III. This test is a timed test of oral passage reading and provides measures of reading accuracy and speed. "(Student) received the lowest possible score on this test; his reading was extremely slow and inaccurate. [Student] had a great deal of difficulty with even the first passage, which should be read fairly easily by a child in first grade."

25. The NJC Report's summary stated, in part: "Test results, [Student's] history of difficulty with reading and pre-reading skills since kindergarten, and a family history for reading difficulties strongly suggest that [Student] has a developmental reading disability, or dyslexia." The Report also stated in the summary "Based on test results, past and present teaching ratings of [Student's] behavior, and behavioral observations during the evaluation, [Student's] attention difficulties meet the diagnostic criteria for Attention Deficit/Hyperactive Disorder, predominately inattentive type" ("ADHD").

26. The NJC Report set forth seven paragraphs of recommendations (with a series of sub-paragraphs). Some of the NJC recommendations, and the appropriate consideration to be given to them, are central to this appeal. Therefore, portions of the recommendations are set forth below.

> 1. [Student's] reading disability requires individualized remedial instruction. Research suggests that formally structured, multi-sensory, phonics-based approaches are most effective for teaching dyslexic children to read and spell. A useful book for those teaching [Student] is Dyslexia: Theory and Practice of Remedial Instruction... This book describes various reading programs which would be appropriate for teaching [Student]. We have found the Auditory Discrimination in Depth (ADD) program to be very useful... If possible, individual tutoring by someone in the area who has been trained in one of these methods would be ideal. Another option would be to have [Student] participate in an intensive Lindamood-Bell workshop. These two- to three-week workshops are offered in Denver periodically... An additional resource is the ... Orton Dyslexia Society... which may be able to supply information about tutors in the Telluride area. In addition to this specialized tutoring, [Student] will also benefit from continued remedial assistance (in both reading and math) in school, emphasizing a slower, phonics-based approach.

27. Recommendation 3 suggests that the Student's "regular classroom teachers be made aware of the nature of his learning disability so that they can make modifications in their curricula which will maximize the development of his strengths without unduly penalizing him for his deficiencies." There followed a series of sub-recommendations

which, in summary, state that curriculum modification would be helpful based upon NJC's assessment that the Student will be slower at reading and writing activities than his classmates, that normal expectations for spelling are inappropriate, and that he may struggle with normal writing demands. Recommendation 4 was that "Children with ADHD often benefit from stimulant medication. It is recommended that [Student] receive a medication evaluation in order to determine whether his attentional process may be improved with medication." Recommendation 7, more of a generalized comment, states:

> One of the most serious threats to the continued educational process of learning-disabled children is the sense of frustration and failure which they often experience in school.... These experiences can have negative effects in the child's self-esteem and seriously affect academic motivation and interest... [Student] is fortunate to be in a school in which he can receive individualized services, and in which teachers and special education personnel are responsive to his needs... It is essential that [Student's] teachers recognize the nature of his disabilities and continue to provide appropriate support and classroom modifications.... In addition, effort should be made to provide experiences which will furnish success and allow [Student] to develop his strengths.

28. The educators who have worked with the Student support the recommendations of the NJC Report.

29. In the Spring, 1995, based on the recommendations of the NJC Report, the parents of the Student had a medical evaluation done. After trying several options, the parents put the Student on the medication Ritalin in May, 1995. The Student did not take Ritalin during Summer, 1995, but in the beginning of the school year, September, 1995, when Student was in the third grade, Student again began taking the medication. The teachers in the District were aware that Student was taking the medication, and in fact, he required some dosage during the school day. The mother of the Student testified that there appeared to be a significant improvement in the Student's attitude and behavior while he was on this medication, and he continued the medication throughout the third grade school year. From testimony from both parents and the teacher, the Student appeared to have ups and downs that could not be totally identified by either failure to take the medication, or when on medication. At the end of the school year, the parents took Student off medication due to serious concerns about side effects (primarily weight loss), that Student exhibited.

30. In the Spring, 1995, based on their understanding of the recommendations of the NJC Report, the parents engaged the services of Megg Lynch to tutor the Student. No written records of her schedule were submitted. Lynch worked with the Student for about an hour a day for an average of three days a week. The parents believed she had some special education experience; however, there was no evidence presented to document Lynch's background in teaching or in special education. There was no testimony

presented or evidence submitted to indicate that she had any training in the Lindamood-Bell process.

31. On May 31,1995, a review staffing was held to review the Student's IEP and make recommendations for the next year. Attending the staffing were the special education teacher, second grade regular teacher, speech and language pathologist, a special education director, school psychologist, and the father of the Student. The following were noted on the IEP review:

a. Educational: the Student was a non-reader in September 1994 and was currently at a second grade level. ("Skills have been growing throughout the year.") The Student's educational needs were "to read and write on a consistent basis (summer)-father considering tutoring."

b. Physical: it is noted that the Student began Ritalin in May and changes were seen in academics: more writing, ability to focus, and positive attitude. "Needs to continue to monitor medication."

c. Communicative: the objectives under the November 1994 communication goals were accomplished in May 1995. No concerns were noted.

d. Psychological- the Student showed gains in self-esteem and mental fatigue, with a need to continue self-esteem gains. Improvement was also noted in the social and vocational areas. The IEP Review noted PC and ADHD as the handicapping conditions and the rationale for placement.

32. The recommended placement was regular education six hours per day with consultive assistance and resource intervention one hour per day, beginning September, 1995, based upon the Student's significant reading and written language difficulties. The review noted that the Student "needs to be involved in all forms of learning this summer to take advantage of increased self-confidence."

33. One of the indicated purposes of the staffing was to consider ESY, but it was decided not to refer for an ESY staffing based on "sufficient recoupment."

34. The IEP, which was signed by the Petitioner, addressed the Student's needs (in priority order) in reading, writing, math and spelling. For reading, the stated goal was to improve reading skills, with the following objectives:

> When given an early second grade passage of 60 words, [Student] will be able to read with intonation, fluency and have 80% accuracy of the words by the end of October 1995. After reading the above passage [Student] will be able to answer 4 out of 5 comprehension questions. Given the same words he successfully read in the reading passage he will be able to

> correctly identify them in a different context 60 % of the time (words will be recorded in a journal).

Regarding spelling skills, the objectives were:

> Given a spelling test of 10 words Student will achieve 70-80% on the first 3 weeks tests. If achieved, list is increased by 2 words for the next 3 weeks. This will progress until [Student] has a list of 15 words. Given these same words in other contexts, [Student] will remember and read 60% of them.

Regarding math skills, the objectives were:

> Given the tools of multiplication... [Student] will be able to understand the concept by making an array using the facts up to three. Given 1d + 1d addition problems with carrying [Student] will be able to do 8 out of 12 problems correctly. Given 2d + 2d addition problems with carrying [Student] will be able to do 6 out [sic] 10 problems correctly... [Student] will be able to know his math facts to 15 with 80% accuracy. Given 10 subtraction problems with borrowing [Student] will successfully complete 8.

Regarding writing skills, the objectives were:

> Given a writing assignment [Student] will be able to write a paragraph of 5 sentences with correct punctuation, spelling, and logical sequence with 70% accuracy.

35. The NJC report suggested that an option for serving the Student's educational needs would be to have the Student participate in an intensive two or three week Lindamood-Bell workshop. The parents of the Student considered such placement for the Summer, 1995, but decided that the Student was so frail emotionally, due to his educational failures, that they decided Student should take the summer off and be allowed to "just be a boy."

36. On May 31, 1995, Petitioner wrote to Dr. Ann Brady, Superintendent of the District, requesting reimbursement for the cost of the outside evaluation done by NJC in the amount of $1,157.75. He also requested reimbursement for tutoring costs of $75 per week for Ms. Lynch and for the anticipated cost of sending the Student to the Lindamood-Bell Program for two weeks at $1,100 per week. During the summer there was correspondence exchanged between the Petitioner, the District and the District's attorney. In late August, 1995, the District authorized reimbursement for the cost of the NJC evaluation and denied the school's obligation or intentions to pay for tutoring or placement of the Student in the Lindamood-Bell Program.

37. The Student entered the third grade in the District in September, 1995.

38. The IEP was rewritten in September 1995 with the goals of improving reading, writing skills, math skills, and spelling skills. The objectives for these goals were more definitive than previous IEPs and this document was updated throughout the year to indicate the progress on achieving the objectives. The objectives, where identified, indicated that the Student was being given the work at a first grade and second grade level, and throughout the year was achieving some success in accomplishing the objectives.

39. In November, 1995, a meeting was held between the teachers and the parents to review the IEP and consider modifications. The IEP developed during Fall, 1995, was adopted.

40. An Annual IEP Review Staffing was held on May 28,1996, at the end of the Student's third grade school year. In addition to the parents, this meeting was attended by the regular education teacher, special education teacher, special education director, the building principal, and the school psychologist. The entries on the form regarding the Student's current performance were made by the school psychologist, who indicated that the Student was "reading more fluently. Still struggling/over one year behind in reading." He noted that the Student had improved in spelling, appeared to be reading at an early second grade comfort level and still used his fingers for addition and subtraction calculation. It was also indicated by the special education teacher that reading skills were fluent for early second grade material; spelling skills were on a first grade level; and that the Student was overwhelmed by too many math problems.

41. The IEP Staffing then turned its attention to the following year, which would be the beginning of the 1996-97 school year. The program for the coming year indicated an annual goal of improved reading skills and short-term objectives; when given a mid-second grade reading passage to read, the Student will be able to read 100 words with no more than five errors 90 percent of the time and the Student will read with fluency and intonation four out of five trials. For writing, the annual goal was to improve written language skills. The short-term objectives were not related to a grade level.

42. The staffing form indicated that the Student was not eligible for ESY during the summer of 1996, again noting "sufficient recoupment." Modifications to the general education program were noted as follows: instructional strategies of computer assistance, more time for tests, parents utilizing a tutor. The District did not conduct any standardized tests to measure regression and recoupment. The District relied upon the assessment of the Student's progress by the Student's classroom and special education teachers based upon their observation and evaluation of his work.

43. An undated document entitled "Consideration for Extended School Year Data Collection" was based on data during the 1995-96 school year, for consideration of the

Student's eligibility for ESY for the summer of 1996. This document is devised to provide periodic reporting of the Student's academic accomplishments and to compare such accomplishments against a baseline of IEP targeted skills, beginning with a May 1995 baseline and recording academic achievements after various periods of being out of school during the course of the year. Much of the required data (including the information for the May baseline) is not entered, and there are no comments made to indicate a recoupment rate.

44. The quarterly progress reports from the Resource Room indicated that the Student made gains during the school year. The Progress Report for the third grade for four quarters indicated that the Student was graded satisfactory, very good and excellent in all subject reports, and would be promoted to the fourth grade.

45. Under date of July 5,1996, the Petitioner directed a letter to the Director of the Southwest Board of Cooperative Services ("SWBOCS") stating that on review of the IEP for the 1996-97 school year, the parents of the Student believe the IEP to be seriously inadequate and inappropriate, and stating their reasons for this belief. The letter asked for a meeting to attempt to resolve the issues of the IEP. There was no indication that such a meeting took place.

46. Under date of July 6,1996, the Petitioner directed a letter to Dr. Ann Brady stating Petitioner's intent to place the Student in a four-week Lindamood-Bell Auditory Discrimination In Depth Program during the Summer, 1996 and requesting that the District pay the cost of the program of approximately $4,640.00. This letter states that the 1995 NJC Report had recommended this program to remediate the Student's reading difficulties and again states Petitioner's concern about the latest IEP developed for the Student. The letter also indicates the parents' research and discussions with different persons that they claimed impacted their decision to select the Lindamood-Bell program. This letter further requests the use of a computer for the Student to use at home since the Student had been making some progress using a computer. The letter also requested that "pending a review of [Student's] performance and testing at the Lindamood-Bell program this summer, I request that [Student] be furnished with a tutor who has been properly trained in either the Lindamood-Bell or Orton-Gillingham method during the coming school year."

47. The Petitioner's letter to Dr. Brady of July 24,1996, wherein the Petitioner requested a due process hearing, also indicated that the District had advised the Petitioner that it would not pay for the cost of the Lindamood-Bell program for the Summer, 1996

48. During the Summer, 1996, the parents placed the Student in the Lindamood-Bell Learning Processes Program in Newport Beach, California, for a diagnostic evaluation. On July 29, 1996, the Student was enrolled in the Lindamood-Bell Clinic for four weeks of "intensive treatment." The stated focus of the treatment was to develop: (1) auditory conceptualization for decoding and spelling; (2) symbol imagery for word recognition and spelling; and (3) concept imagery for language comprehension and vocabulary. The Student was pre-tested upon entering the Clinic and post-tested after approximately four

weeks. Ten test segments were used with a number of sub-tests. The results of the pre-testing and post-testing was submitted in the Lindamood-Bell Progress Report at the completion of the program. The results of each of the testing areas was discussed in the Progress Report and the Clinic provided a summary and recommendations.

49. The Lindamood-Bell Clinical Report indicates the Student made good or substantial progress in several areas, particularly in auditory conceptualization/ "phonemic awareness" and in concept imagery. This improvement was attributed to the training received at the Clinic's program. Other tested areas showed modest or little growth and the Clinic suggested that the Student would need to continue with the type of training provided by the Lindamood-Bell process. The Clinic's report made the following recommendations: that the Student return to a Lindamood-Bell Clinic to continue the Student's good progress. The focus of treatment would be: (1) continue development and application of auditory conceptualization to multi-syllable decoding and spelling; (2) continue development and application of symbol imagery to word recognition, spelling and increasing [Student's] reading rate; (3) continue development and application of concept imagery to follow oral directions, expressive vocabulary and written language comprehension; and (4) stimulation and applying visualizing and verbalizing techniques to the understanding and application of mathematical concepts.

50. The Clinic report further recommended that "in the meantime it will be important for [the Student] to read and spell daily with an adult who has received formal training using the Auditory Discrimination In-Depth and Visualizing and Verbalizing programs."

51. In September, 1996, the Student entered the fourth grade in the Telluride School District. At that time, neither the parents nor the District had signed or agreed to the IEP covering the Student's special education program for the 1996-97 school year. At the time of the local evidentiary hearing, the Student was attending regular education classes in the District school for most of the day. He started in special education classes in the District, but was withdrawn from special education. There was no special education IEP in place at that time.

52. Linda Shepard was qualified as a expert witness in the Lindamood-Bell method and its use and application with learning disabled students. The witness testified that she began her training in the Lindamood-Bell Clinic in California in 1981. In California she worked as clinician providing diagnostic measures in intake, pre-test and post-test, and worked primarily with students who had auditory conceptual dysfunction. In 1988, she moved to Denver, Colorado, and opened her own clinic. In 1996, she moved to the Telluride, Colorado area with the stated intentions of continuing to practice as a Lindamood-Bell clinician and consultant.

53. Ms. Shepard and her son had been working with the Student since late September, 1996, using the Lindamood-Bell teaching process; it was Ms. Shepard's opinion that the Student was progressing in improving his academic abilities. Ms. Shepard

described the Lindamood-Bell system as the "Auditory Discrimination In Depth Program," which is not a reading program. It is a linguistically driven pre-phonics program which lays the foundation so that Students may acquire stronger language skills through a variety of other good reading programs.

54. Ms. Shepard had conducted a one-week training workshop for teachers in the District and the SWBOCS during the Fall, 1996 and laid the foundation for the beginning stages of the Auditory Discrimination Program. At the time of the local evidentiary hearing, the District planned to have these teachers begin to use the Lindamood-Bell method in their classrooms under the clinical supervision of Ms. Shepard.

IHO CONCLUSIONS

Based upon the findings of fact made by the IHO, the IHO reached the following conclusions.

Consideration of the NJC Report. The IHO found that the District accepted the independent evaluation by NJC and was obligated to consider the evaluation in developing the Student's IEP and subsequent program, although the District was not required to incorporate every recommendation into the IEPs. The IHO found that the NJC report was considered when the IEPs were prepared and that many of the NJC recommendations regarding educational and programmatic issues, including protecting the Student's self-esteem, were incorporated in the IEPs. However, the IHO found that the District had not considered or extended to the Student the recommendations of participation in a Lindamood-Bell workshop and the provision of a specially trained tutor.

Adequacy of the November 1995 and May 1996 IEPs. The IHO concluded that the IEPs were developed by educational professionals who intended to develop a program and instructional methods that would allow the Student to benefit educationally. The parents were fully involved in the process of developing the IEPs. The content of the educational program developed for the Student reflected the NJC recommendations and the knowledge and experience of the professional staff who worked with the Student. The IHO found that the IEPs contained objectively measurable goals and objectives, which were adequate, although not fully meeting the standards of Appendix C to the IDEA. The deficiencies in the procedural structure of the IEPs were not sufficient to deny Student free appropriate public education ("FAPE").

ESY. The IHO concluded that the District's examination of whether the Student would regress over the summer period was insufficient and that the District should have, but did not, consider other factors in addition to regression, including the degree of the child's impairment, the parents' ability to provide education in the home, the child's rate of progress, the child's need for interaction with non-disabled peers, vocational training, the child's behavioral and physical problems, the availability of alternative resources, and whether the requested service is extraordinary for the child's condition. The IHO noted that the Student demonstrated some regression during the school year in terms of inconsistency in his performance and noted that the Student's rate of progress was not what his parents wanted or expected and was at a rate far below his classmates. Based upon a lack of documented evidence from the District demonstrating that Student would not benefit from ESY, the IHO concluded that the Student would benefit from the Lindamood-Bell program during the summers of 1995 and 1996 and therefore was eligible for ESY for those years. Based upon the District's acceptance of the recommendations of the NJC report, the IHO concluded that the four-week placement in the Lindamood-Bell program in 1996 was an appropriate replacement for the ESY program the District should have provided.

Tutoring. The IHO found that there was no evidence that Megg Lynch had the special training referred to in the NJC recommendation regarding tutoring, or that the tutoring was necessary to meet the Student's educational needs. Therefore, the District was not responsible for reimbursement. The IHO further concluded, with regard to Linda Shepard, that the May 1996 IEP was in place for the 1996-1997 school year. At the time of the hearing, the parents had not placed the Student in the special education program in the District. Rather, they chose to engage Ms. Shepard. The IHO concluded that the District was not liable for reimbursement for Ms. Shepard's services.

IHO order. The IHO ordered that (1) the District must reimburse the Petitioner $3,499 as payment for the Lindamood-Bell program in 1996; (2) the District must review the IEP and the procedures for developing the IEP in order to bring it into full compliance with the IDEA; (3) that a staffing be held to develop a new IEP for the school year 1996-1997.

ISSUES UPON STATE LEVEL REVIEW

A. **The District's Notice of Appeal** raises the following issues:

1. Whether the District improperly failed to consider the recommendations of the NJC evaluation regarding the Lindamood-Bell system.

2. Whether the District was required to implement all of the recommendations of the NJC evaluation.

3. Whether the Student was qualified to receive extended school year services ("ESY") for the summer of 1996.

4. Whether the program attended by the Student in the summer of 1996 was the ESY for which he was qualified, if any.

5. Whether Petitioner is entitled to reimbursement for the Student's unilateral placement in the Lindamood-Bell program for the reasons found by the IHO.

B. The Petitioner's Notice of Cross-Appeal raises issues 1 and 3 above, and adds the following issues:

6. Whether Petitioner is entitled to reimbursement for the cost of the Student's participation in the Lindamood-Bell program in the summer of 1996 in the amount of $4,363 rather than the $3,500 found by the IHO.

7. Whether Petitioner is entitled to reimbursement for the cost of tutoring services provided by Megg Lynch in the amount of $2,184.

8. Whether Petitioner is entitled to reimbursement for the cost of tutoring services provided by Linda Shepard in the amount of $1,758.

9. Whether the individualized education plans ("IEPs") developed for the Student in 1995 and 1996 were adequate and appropriate.

10. If the IEPs were not adequate or appropriate, the appropriate remedy therefor.

11. Whether the District is required to provide continuing tutoring or other special education services by someone trained in one of the methods suggested by NJC.

DISCUSSION

States which receive federal grants under IDEA are required to provide each child with a disability a FAPE tailored to the unique needs of the child through the establishment of an IEP for that child. 20 U.S.C. Section 1401(20). Under IDEA, a FAPE is defined as special education and related services which are provided at public expense and under public supervision, meet state standards and comply with the child's IEP. 20 U.S.C. Section 1401(18).

In the *Rowley* case, the Supreme Court held that this minimum standard is that the State must provide a handicapped student with access to specialized instruction and related services which are individually designed to provide educational benefit to the student. *Rowley* at 201. If the state agency has complied with the procedural requirements of the IDEA, and the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the State has complied with the IDEA. *Rowley* at 206-207. *See also, Bonnie Ann F. v. Calallan School District,* 833 F.Supp. 340 (S.D. Tex. 1993). The District is obligated to provide a floor of opportunity to students, not to provide the absolute best education or the one that maximizes the potential of each Student. *Rowley,* at 198-199; *Dreher v. Amphitheater Unified School District,* 797 F. Supp. 753 (D. Ariz. 1992); *Cordrey v. Euckert,* 917 F.2d 1460 (6th Cir. 1990), *cert. denied,* 111 S.Ct. 1391 (1991) (*"Cordrey").*

Petitioner argued below and in this state level review that the Student was denied FAPE because the District failed to properly consider the NJC evaluation; the 1995 and 1996 IEPs failed to develop objectively measurable standards; and the District failed to provide ESY for which the Student was eligible in 1995 and 1996. The Petitioner, as the party attacking the appropriateness of the IEPs, has the burden of proof. *Johnson v. Independent School District No. 4*, 921 F.2d 1022 (10th Cir. 1990) (*"Johnson"*); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) (*"Alamo"*); *Cordrey, supra*.

NJC Evaluation

There is substantial evidence in the record to support the IHO's finding that the District considered the NJC evaluation and incorporated several of the suggestions in the NJC report when it developed both the 1995 and 1996 IEPs. The IHO properly stated that the standard for the consideration of independent evaluations does not require that the District adopt each and every recommendation of the evaluation, rather, it must simply consider the evaluation with other evaluations and factors when the IEP is formulated. *See Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824 (8th Cir. 1988); *T.S. v. Board of Education*, 10 F.3d 87, 20 IDELR 889 (2d Cir. 1993); *Letter to Anonymous*, 23 IDELR 564 (OEP 1995). Having found that the District did consider the report, the IHO erred in making a further determination that the District was obliged to provide the additional services of the Lindamood-Bell workshop and tutoring. In so doing, the IHO apparently was persuaded by the lack of evidence that the District specifically considered and rejected those services. Nothing in the law cited by the Petitioner, however, requires the District to prove that it did so. Nevertheless, the District was asked to provide Lindamood-Bell training and tutoring by Petitioner in 1995 and refused to do so. This is evidence that it considered these two recommendations.

The NJC Report itself does not opine that *all* of its many recommendations must be in place for the Student to experience educational benefit, nor was there other persuasive evidence to support this premise. The first recommendation in the Report was that the Student receive individualized remedial instruction. This recommendation could be implemented in different ways. The District was prepared to and did offer the Student individualized attention as to his modified curriculum in the regular classroom and particular attention in the Resource Room. By incorporating some recommendations and refusing to incorporate others, the District engaged in choice of methodologies. In this area, deference is give to local educational professionals knowledgeable about the Student. *See Sioux City Community School District*, 20 IDELR 107 (1993). Thus, the Administrative Law Judge concludes that the District did give due consideration to the NJC evaluation in the process of developing the IEPs in cooperation with Student's parents.

Adequacy of the November 1995 and May 1996 IEPs

The federal rules require that parents have a meaningful opportunity to be involved in the process of developing an IEP for their child. 34 C.F.R. §300.345. There is no claim that Student's parents were not provided every opportunity to work with the District on issues concerning the Student's educational needs. In order to comply with the IDEA, an IEP must contain a statement of the child's present level of educational performance, a statement of annual goals, including short-term instructional objectives, a statement of the specific special education and related services to be provided to the child, the projected dates for initiation and duration of the services, and "[a]ppropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved." 34 C.F.R. §300.346. Petitioner argues that the goals and objectives of the IEPs were inappropriate because they were not directed towards closing the gap between his indicated ability and his level of functioning, which Petitioner states is required by 34 C.F.R. §300.346 as further explained in Appendix C to part 300. Appendix C, however, does not state that requirement in just that way. Rather, it explains that the IEP goals and objectives "should focus on offsetting or reducing the problems resulting from the child's disability that interfere with learning and educational performance in school." §300.346, Q40.

An IEP's goals and objectives need not be as specific as those found in a lesson plan, but rather are to be used as guides to parents and teachers to track the child's progress. §300.46 Q36. The appropriateness of an IEP is judged prospectively; a lack of expected progress under an IEP does not render that IEP, or a subsequent similar one, inappropriate because the child's needs are to be gauged at the time the IEP is developed. *Carlisle Area School v. Scott P.*, 62 F.3d 520 (C.A. Pa. 1995), *cert. denied,* 116 S. Ct. 1419 (1996).

The IDEA and the cases decided thereunder regarding IEPs emphasize that the focus must be on the individual child and the evidence regarding that child's needs and capabilities. For instance, in *Egg Harbor Township Board of Education v. S.O.*, 19 IDELR 15 (D.N.J. 1992), the student, who experienced "reading problems," was in a special education program in the district for four school years. His IEP failed to include annual goals and the evidence established that over the years he had received special education services he had made negligible progress and in fact continued to be a non-reader, although he had been promoted from grade to grade. The Student in *Egg Harbor* was placed by his parents in a private school, where he made significant progress. The court, while recognizing that a child's failure to achieve educational benefits is not dispositive of the issue, ruled that where progress has been *de minimis* and the record establishes that the student has the potential for greater progress without undue burden to the school district, the court can infer that the deficiencies in the district's programs denied the student a FAPE. *Id* at 17. The court looked not only at the content of the IEP, but the quality of the program provided and the level of achievement of the student in the program.

Petitioner cites *Carter v. Florence County School District Four,* 950 F.2d 156 (4th Cir. 1991) ("*Carter*") in support of his argument that an IEP is inadequate where it proposes only a *de minimis* improvement for the Student. In *Carter*, the fourth circuit ordered the school district to retroactively reimburse the parents for their unilateral placement of the Student in a private school. The Student, who was only diagnosed with a learning disability in the ninth grade, was performing at a fifth grade level in reading and a sixth grade level in math. The IEP proposed that the Student make an advancement of four months progress in an entire school year. The court cited *Rowley* regarding the use of factors such as the program's likelihood of allowing the Student to achieve passing marks and advancing from grade to grade in determining whether the plan is likely to produce an educational benefit. *Carter* at 160. The lower court had found, and the Fourth Circuit affirmed, that the amount of special education proposed under the IEP was inadequate for that particular Student to achieve an educational benefit and thus a FAPE. When the *Carter* case was appealed to the United States Supreme Court [114 S.Ct 361(1993)], the Court did not address the issue of whether the Student's IEP was appropriate. [1]

Although a child's failure to make reasonable or expected progress under an IEP does not establish a violation of the IDEA, actual educational results are relevant to a determination of whether a student has received educational benefit. *Chrism D. v. Montgomery County Board of Education,* 753 F.Supp. 922 (M.D. Ala. 1990). In this case, the IHO found that the Student had made progress. Substantial evidence in the record has established that the Student's progress was sufficient for him to achieve passing grades and advance to the next grade. He made progress in his self-esteem and willingness to participate in the learning process, as well as in reading and in math. The IEP may have set modest goals but the parents were involved and the teachers worked closely with the parents to help Student attain an educational benefit. The IHO found that any deficiencies in the IEPs regarding goals and objectives were insufficient to deny the Student a FAPE. This conclusion is supported by the record and is affirmed. *See Urban v. Jefferson County School District R-1,* 870 F.Supp. 1558 (D.Colo. 1994); *Hiller v. Board of Education of Brunswick Cent. School District,* 743 F.Supp. 958 (N.D.N.Y. 1990).

ESY

The District challenges the IHO conclusion that the Student was eligible for ESY in 1996, [2] and his order requiring the District to reimburse Petitioner for the cost of the Lindamood-Bell program in the summer of 1996. Petitioner has appealed as insufficient the amount of the reimbursement ordered. The Administrative Law Judge concludes, based upon a review of the record, that the IHO improperly determined that the Student was eligible for ESY and therefore entitled to reimbursement for the Lindamood-Bell workshop.

When considering the appropriateness of a summer program, the issue is not whether it would be beneficial for a child (a generalization could easily be made that a program of some type would benefit most children). The issue is whether the program is a necessary component of an appropriate public education for the disabled child. *E.g., Rettig v. Kent City School District,* 539 F.Supp. 768, 778 (N.D. Ohio 1981). As in other cases brought under the IDEA, the focus is always on the needs of the specific child within the context that the IDEA does not require the absolute best education or one that maximizes the child's potential. *Dreher v. Amphitheater Unified School District,* 797 F. Supp. 753 (D.

Ariz. 1992), citing *Gregory K. v. Longview School District*, 811 F.2d 1307 (9th Cir. 1987) and *Rowley; Carlisle, supra.*

The Fifth Circuit addressed the issue in the *Alamo* case, when it determined that a severely handicapped child was eligible for ESY because the evidence established that the child's progress would regress during the summer months without a continuous structured program. The court's standard was "severe or substantial regression," that is, that the benefits accrued to the child during the regular school year would be "significantly jeopardized" without an educational program during the summer. *Alamo* at 1158.

The Tenth Circuit has articulated the standard for determination of whether a child is eligible for ESY services in the *Johnson* case. In *Johnson*, a severely and multiply handicapped child requested ESY. The child's parents were unable to establish that any regression had occurred during the previous summer and the lower court was not persuaded by evidence that predicted future regression in the absence of ESY. The *Johnson* court held that the *Alamo* analysis, which relied upon evidence of past severe or substantial regression, was too narrow. The court noted that other courts had used different factors in analyzing what constitutes an "appropriate" educational program under 20 U.S.C. '1412. As the Supreme Court held in *Rowley,* no one test should be used to determine the adequacy of the educational benefits conferred upon all disabled children. The Tenth Circuit did adopt the *Alamo* standard of deciding whether the benefits accrued to the child during the school year would be significantly jeopardized without ESY. The court held, however, that this determination needs to be made:

> by applying not only retrospective data, such as past regressions and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community. *Johnson* at 1028.

In making the decision, the *Johnson* court weighed conflicting competent evidence on the issue of regression and recoupment. Where there is such a conflict, the court held, other factors should have been considered, such as the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide educational structure at home, the child's rate of progress, the child's behavior and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, and whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. The court did not mandate that any particular factors be applied in every case.

In applying the standards of *Johnson* and *Alamo* to this case, the Administrative Law Judge concludes that there is insufficient evidence in the record to establish that the

Student was eligible for ESY in 1996. The IHO stated that his decision was made in reliance on the *Cordrey* case, which incorporated the standards articulated in *Rettig* and *Alamo.* The Administrative Law Judge disagrees with the IHO's conclusion that *Cordrey* supports a conclusion that ESY should be awarded to the Student in this case. The *Cordrey* court held that where there is no empirical data that the child has regressed in the past to the serious detriment of his educational progress, "need [for ESY] may be proven by expert opinion, based upon a professional individual assessment." *See also In re Child with Disabilities,* 21 IDELR 697 (1994). The Sixth Circuit considered the needs of a severely disabled child and considered whether the evidence established "significant skill losses of such degree and duration so as seriously to impede his progress toward his educational goals." *Cordrey, supra.* Evidence in the form of expert testimony weighed by the court was conflicting on the issue of regression. The court affirmed the lower court determination that the child was not eligible for an ESY because the evidence had established that the child experienced continual regression during the school year and that, although he made slow progress under his IEP, his progress was not dependent on an ESY.

The IHO relied upon the testimony of some of the Student's teachers and tutors that the Student experienced some regression periodically during the school year and that the Lindamood-Bell program was beneficial for the Student. Petitioner did not establish through any competent expert testimony that an ESY was necessary in order for Student to avoid serious detriment to his educational progress, as required under *Cordrey.* Petitioner testified and argued, and the IHO found, that the Student's rate of progress not only "was not what the parents expected or desired, but was at a rate far below (Student's) classmates." This is not a proper standard by which to judge the need for ESY. The consideration must be whether a particular disabled child is receiving meaningful educational benefit, not whether the child is "catching up" or, instead, there is a "widening gap" with the child's peers. *El Paso Independent School District v. Robert W.*, 898 F.Supp 442, 449 (W.D. Tex. 1995). The NJC Report confirmed this when it stated that the Student's performance would be behind that of his classmates.

The IHO apparently was swayed by his concern that the District had not adequately weighed and documented all of the appropriate factors when it reached its determination that ESY was not necessary for the Student. While the Administrative Law Judge agrees that the decision should be carefully considered when the child's IEP is being developed, in this case, the Petitioner has not met his burden of proof that the District was wrong and that the unilateral placement of Student in a four-week intensive workshop was a necessary part of the FAPE the District was obligated to provide for the Student. [3]

Tutoring

The IHO found, based upon substantial evidence in the record, that Petitioner was not entitled to reimbursement of the services of two tutors for the Student. Megg Lynch began working with the Student in 1995, although tutoring services were not included in the IEP. At the end of the 1995 school year, Petitioner requested retroactive reimbursement for Ms. Lynch's services, as well as the cost of the NJC evaluation and a request for the District to pay for a two-week Lindamood-Bell workshop. The District agreed to pay for the NJC evaluation, but refused to pay for the tutoring or the workshop. Petitioner continued to pay for the unilateral placement of the Student with Ms. Lynch as an adjunct to the special education services the Student was receiving under his IEPs. In the Fall, 1996, Petitioner chose not to place the Student in the Resource Room, as determined in the May 1996 IEP. Rather, the Student continued to be a public education student in the District, but his parents engaged the services of Linda Shepard and her son to work with the Student daily using the Lindamood-Bell methods.

The IHO properly found that the Student was provided a FAPE under the IEPs at issue in this case. Given this conclusion, Petitioner is not entitled to reimbursement for his unilateral placement of the Student with private tutors in addition to or as a substitute for the special education the Student was receiving from the District. Both parties have cited *School Committee of the Town of Burlington v. Department of Education,* 471 U.S. 359, 105 S. Ct. 1996 (1985). In *Burlington,* the school district and the parent were in agreement that the child's educational needs were not being met by his current placement. The district proposed an IEP with a new placement. Based upon an independent evaluation, the parents chose a different program which was recommended by the evaluation and enrolled the child in private school. The parents rejected the IEP and requested a due process hearing. The Court held that where a court determines that the private placement desired by the parents was proper under the Act and the IEP calling for placement in a public school was inappropriate, the district could be ordered to implement an IEP placing the child in the private school at public expense. *Burlington* at 2002, 2003. The IHO found, based upon substantial evidence, that Petitioner did not establish that the IEPs were inappropriate or that the services of Ms. Lynch were necessary under the IDEA in order for Student to have a FAPE.

The Student's parents took a different approach with the services of Ms. Shepard and her son. The parents decided to substitute the tutors' services for the special education services of the Resource Room, which were provided under the May 1996 IEP. Again, the IHO has properly concluded that the 1996 IEP substantially met the procedural and substantive requirements of the IDEA. The Petitioner did not establish that the methodology he preferred for the Student was more appropriate than the methodology selected by the District or that District would not have provided an appropriate education for the Student in the 1996-1997 school year. Petitioner's placement of the Student with Ms. Shepard rather than the Resource Room was at his own financial risk. *Burlington, supra.* The Administrative Law Judge has considered that the services of a tutor with skills in the Lindamood-Bell method was one of the recommendations of the NJC Report. As the Administrative Law Judge found above in the discussion regarding ESY, however, the inclusion of tutoring by an individual trained in a particular method within the options of the first NJC recommendation is not adequate evidence that such services are necessary for the Student to receive a FAPE or that they should substitute for the services outlined under the May, 1996 IEP. *See Gregory K. v. Longview School District,* 811 F.2d 1307 (9th Cir. 1987). [4] Therefore, the Administrative Law Judge concludes that Petitioner is not entitled to reimbursement for the tutoring services of either Ms. Lynch or Ms. Shepard and her son.

DECISION AND ORDER

It is the decision of the Administrative Law Judge that the IEPs developed for the Student in 1995 and 1996 were adequate and appropriate. The District properly considered the recommendations of the NJC evaluation regarding the Lindamood-Bell system and was not required to implement all of the NJC recommendations. Petitioner has not established that the Student was eligible to receive ESY services in 1996 and therefore the District is not required to reimburse Petitioner for the unilateral placement of the Student in the four-week Lindamood-Bell program. For the reasons set forth above, it is also the decision of the Administrative Law Judge that Petitioner is not entitled to reimbursement for the tutoring services of Ms. Lynch and Ms. Shepard and her son incurred prior to the due process hearing below. The Administrative Law Judge has not decided the issue of whether ongoing tutoring or other special education services by someone trained in one of the methods suggested by NJC would be required. There was insufficient evidence in the record to make such a determination prospectively. The District shall address this concern when it conducts its triennial evaluation of the Student's current needs [pursuant to 24 C.F.R. §300.532] and in the process of developing a new IEP.

This decision of the Administrative Law Judge is the final decision on state level review except that any party has the right to bring a timely civil action in an appropriate court of law either federal or state. State Plan, Part II.A.VII.B.10 and 2220-R-6.03(12), 1 CCR 301-8.

DONE AND SIGNED
March _____, 1997

NANCY A. HOPF
Administrative Law Judge

FOOTNOTES

[1] The Court addressed only the two issues of (1) whether retroactive reimbursement is a proper remedy where parents have unilaterally placed the child in private school and the courts later find that the placement was appropriate because the educational agency did not provide a FAPE and (2) whether the private school must meet the requirements of 24 U.S.C. §1401(a) in order to be an appropriate placement.

[2] The IHO also concluded that the Student was eligible for ESY services in 1995 but that the Student's parents would not have utilized such services at that time.

[3] Having decided that Student was not eligible for ESY, the Administrative Law Judge does not reach the issue of whether the Lindamood-Bell program would have been an appropriate placement for Student, had he in fact been eligible for a summer program.

[4] It should be noted that the Student had already attended an intensive Lindamood-Bell workshop and by the time of the evidentiary hearing the District had taken steps to incorporate this approach in the curriculum for Student.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to: [redacted] (and, at his request, by facsimile to ([redacted]); and to Kenneth A. DeLay, Esq., Miller, DeLay & Crabb, P.C., 2008A West 120th Avenue, Westminster, CO 80234 on March _____, 1997.

____
Secretary to Administrative Law Judge

Case No.: **S96:118**

Status: State Level Review

Key Topics: Jurisdiction of the IHO
Home-Based Education
Free Appropriate Public Education (FAPE)

Issues:

- Whether the IHO erred in concluding that she had no jurisdiction to grant any of the relief requested by the student.
- Whether the IHO erred in concluding that the district had no obligation to provide special education and related services to the student because she was being home-schooled at the time of the hearing.
- Whether the IHO erred in concluding that she had no jurisdiction to consider whether the district had provided the student with a FAPE by educating her in a safe environment.

Decision:

- The IHO had no authority to grant any of the relief requested by the student in this due process hearing pursuant to either IDEA or ECEA. The IHO properly dismissed the student's request for a due process hearing.
- A home-schooled child in Colorado is not enrolled in a private school or facility and a school district is not required by IDEA to provide special education and related services to such a student.
- As the Administrative Law Judge has affirmed the IHO's dismissal on the above grounds, she need not address the issue of the IHO's dismissal based on her authority to consider a claim of denial of a FAPE due to the failure to provide a safe environment. The ALJ specifically declines to adopt the IHO's reasoning and conclusion regarding this issue.

Discussion:

- Had the student requested relief which was authorized under IDEA for children with disabilities in her circumstances, she would have been entitled to a hearing to allow her to attempt to prove that the alleged harassment and assault arose from her disability, as alleged, and that the magnitude of these events was such that it denied her a FAPE.
- Review and discussion of Colorado law and legislative intent of home-based education.
- Impact of Edgerton case (20 IDELR 126) in support of appellant's case.
- Discussion of the relief requested by the appellant.

Special Ed

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 96-13 S96:118

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER:

[redacted], by and through her grandparents [redacted] and [redacted] [redacted],
Appellant,

v.

LAS ANIMAS SCHOOL DISTRICT,
Appellee.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"); the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq.*, C.R.S. (1995 & 1996) ("ECEA"); and Part II, Section A, VII of the Colorado Department of Education, Fiscal Years 1995-97 State Plan.

At the evidentiary hearing scheduled in this matter before the IHO on November 11, 1996, the IHO granted the Motion to Strike of the Las Animas School District ("District") and dismissed the entire matter without holding an evidentiary hearing. The District's Motion to Strike asserted that the IHO had no authority in an IDEA hearing to address Appellant's claim that she was denied a free appropriate public education ("FAPE") due to a physical assault by a teacher and harassment (name-calling and shoving) by students and staff (collectively the provision of a "safe environment"). The IHO found that she had no authority to grant any of the relief requested by Appellant, that Appellant was entitled to no relief because she was being home-schooled, and that Appellant's "safe environment" claim was not permitted pursuant to IDEA.

Appellant [redacted] ("the student") subsequently filed an appeal through her grandparents [redacted] and [redacted] (collectively "Appellant"). The District filed no cross appeal and concedes that the student's appeal was timely filed. Both parties further indicated that they did not wish to have oral argument in this matter. By February 18, 1997, both Appellant and the District filed opening and reply briefs, and this matter was thus ready for decision. The parties agreed that the Administrative Law Judge would issue the Decision Upon State Level Review by February 28, 1997. The Administrative Law Judge also notified that parties that the tape recording of the November 11, 1996 hearing before the IHO was largely inaudible and gave them through February 26, 1997, to make additional submissions in response to this problem. Neither party made any additional submission.

Appellant and her grandparents are represented in this matter by Melinda Badgley Orendorff, Esq. The District is represented by Jill S. Mattoon, Esq, Petersen, Fonda, Farley, Mattoon, Crockenberg and Garcia, P.C.

STIPULATED FACTS UPON STATE LEVEL REVIEW

Although the IHO did not make explicit findings of fact, she nonetheless relied on certain facts in rendering her Order dismissing this matter. The parties are in agreement regarding the following facts:

1. The student enrolled as a fifth grader at Columbian Elementary School in the District in the Fall of 1993. Before this time, the student was enrolled as a regular education student (although in a Chapter I placement) in a different school district.

2. While at Columbian Elementary School, the student was evaluated for special education, was found to be eligible, and was placed in a special education program pursuant to an Individualized Education Program ("IEP"). The student's disability is classified as perceptual/communicative, but the stipulated facts do not establish any additional information regarding this disability.

3. In the Fall of 1994, the student began her sixth grade year at Las Animas Middle School in the District and continued to be placed as a special education student.

4. On August 15, 1995, before the start of the student's seventh grade year, the student's grandparents withdrew her from the District and notified the District that she would be home-schooled commencing August 28, 1995.

5. On August 9, 1995, the student's grandparents notified the District that the student would be home-schooled beginning August 29, 1996.

6. The student continued to be home-schooled on the date of the hearing, November 11, 1996. She was not enrolled in any District school and had not attended any District school since the end of the Spring 1995 school year.

7. The student's grandparents filed a request for a due process hearing on or about August 28, 1996. Two issues were raised: whether the District provided the student a FAPE by 1) giving her appropriate special education and related services in accordance with an appropriate IEP and 2) by educating her in a safe (physically and emotionally) environment. The first issue raised a number of allegations regarding the adequacy of the development and implementation of IEPs for the

student in the years she was enrolled in District schools. The second, based on alleged assault and harassment (name-calling and shoving) is addressed in greater detail later.

8. At this time, the student is not requesting to enroll in the District or attend any District school.

9. On September 10, 1996, the student and/or her grandparents filed a civil battery and extreme and outrageous conduct action in Bent County District Court. This action was based on the same incident involving George Eidinger, a teacher, which forms the basis for the student's claim in this hearing that she was assaulted.

10. Testing of special education students occurs every two years in relation to eligibility for graduation. The agreed-upon facts do not establish whether the student took or passed this test.

SCOPE OF REVIEW

Pursuant to the IDEA, ECEA and the State Plan, the Administrative Law Judge must conduct an impartial review of the IHO's decision and make an "independent" decision on state level review. 20 U.S.C. §1415(c); 34 C.F.R. §300.510; State Plan, Part II, A, VII, B, 9, b; and 2220-R-6.03(11)(b)(v) (1 CCR 301-8). Since the IHO in this matter made no independent findings of fact but simply relied on the allegations of the student and the stipulated facts, the issue of the Administrative Law Judge's giving "due weight" to those findings at the state level does not arise. *See Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

ISSUES UPON STATE LEVEL REVIEW

The student's Notice of Appeal raises three issues in relation to the IHO's dismissal of this matter without conducting a hearing:

1. Whether the IHO erred in concluding that she had no jurisdiction to consider whether the District had provided the student with a FAPE by educating her in a safe environment.

2. Whether the IHO erred in concluding that she had no jurisdiction to grant any of the relief requested by the student.

3. Whether the IHO erred in concluding that the District had no obligation to provide special education and related services to the student because she was being home-schooled at the time of the hearing.

DISCUSSION

I. Alleged Denial of Procedural Rights

The IHO essentially dismissed the student's request for a hearing on the grounds that the student failed to state a claim upon which relief could be awarded and that the IHO had no authority to grant any of the relief requested. The student now claims that such action deprived her of her right to present evidence and to confront, cross-examine and compel the attendance of witnesses. 20 U.S.C. 1415(d)(2); 300 C.F.R. § 508(a)(2). These are procedural rights which flow from a party's substantive right to a due process hearing. Without such a substantive right (*i.e.*, if the petitioner states no claim upon which relief can be granted or requested only relief which cannot be awarded in a due process hearing), the petitioner is not entitled to a hearing.[1]

The rights cited by the student thus do not determine whether she was entitled to a hearing in this matter. Rather, in determining whether this matter should have been dismissed without a hearing, it is first appropriate to determine if IDEA authorizes any of the relief requested by the student in circumstances such as these when she is being home-schooled and does not seek re-enrollment with the District.

II. Relief Requested by the Student

In her Amended Disclosure Statement, the student outlined six items of relief being sought in the due process hearing: 1) home tutoring provided by or paid for by the District; 2) convening of a staffing to develop an IEP should the student decide to return to public school; 3) a review by the Colorado Department of Education ("CDE") of District policies [regarding the conduct of students and personnel and the disciplinary/grievance procedures to review such conduct]; 4) an investigation by the District of the alleged incident involving Mr. Eidinger, notification to the student of that investigation, and preferably the teacher's dismissal; 5) training for teachers and personnel [regarding student discipline, sensitivity in dealing with students with disabilities, and facilitation of more positive interaction between students with disabilities and regular education students and school personnel]; and 6) the student's being allowed to go through eighth grade graduation ceremonies at Las Animas Middle School. The parties subsequently stipulated to the second request for relief, which is thus no longer an issue.[2]

If in fact the student would be entitled to none of this relief requested, then her request for a due process hearing was properly dismissed. The issue of the District's obligations to home-schooled students with disabilities is closely intertwined with the issue of the relief requested by the student. The two issues are thus addressed together below.

III. The Student's Status as Home-Educated

1. **General Analysis.** The student is currently being home-educated, has been home-educated for approximately 1 1/2 years, and does not now wish to return to a District school. Under these circumstances, the student's request for a due process hearing to enforce her right to a FAPE raises the issue of whether the District is required to provide special education and related services to students who are being home-schooled.

IDEA requires that a school district provide to each child with a disability a FAPE tailored to the individual needs of the child through the establishment of an IEP unique to that child's needs. 20 U.S.C. §§ 1400 *et seq.* and 1401(20). IDEA defines a FAPE as special education and related services provided at public expense, under public supervision, and at no charge which meet state standards and comply with the child's IEP. 20 U.S.C. § 1401(18); 34 C.F.R. § 300.8.

Neither IDEA nor its implementing regulations specifically address the issue of what special education and related services must be provided to a student who is being home-schooled by choice of his parents. The most pertinent regulations are found in 34 C.F.R. §§ 300.400 to 300.487, which address children with disabilities in private schools. Specifically, 34 C.F.R. §§ 300.300.403 and 300.452 require a school district to provide special education and related services to students voluntarily placed by their parents in a private school or facility. 34 C.F.R. § 300.403 and 300.452 read as follows:

> §300.403 Placement of children by parents.
> (a) If a child with a disability has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-452.
>
> . . .
>
> § 300.452 Local educational agency responsibility.
> Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

The Office of Special Education Programs ("OSEP") interpreted 34 C.F.R. §§ 300.403 and 300.452 in *Letter to Williams*, 18 IDELR 742 (1991), and addressed the issue of whether a student with disabilities who is being home-schooled is entitled to special education and related services. OSEP determined that the issue of whether a home-schooled student is enrolled in a "private school or facility" is a question of state law:

Your third question asks whether students with disabilities who are being home educated are covered by the terms of 34 C.F.R. § 300.403 and 34 C.F.R. § 300.452. Under these provisions, public agencies shall make special education and related serviced available to children with disabilities who have been enrolled by their parents in private schools o facilities. Part B, however, does not define the term "private school or facility." Consequently, the determination of whether a particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law. If, under the law of your State, home education constitutes enrollment in a private school or facility, then the requirements of 34 C.F.R. § 300.403 and 34 C.F.R. § 300.452 would apply.

Colorado law specifically provides that home-based education is a legitimate alternative to classroom attendance for the instruction of children. Section 22-33-104.5, C.R.S. (1995). It defines a "non-public home-based education program" in Section 22-33-104.5(2)(a) as follows:

> "Non-public home-based educational program" means the sequential program of instruction for the education of a child which takes place in a home, which is provided by the child's parent or by an adult relative of the child designated by the parent, and which is not under the supervision and control of a school district. *This educational program is not intended to be and does not qualify as a private and nonprofit school.*

(Emphasis added.)

Colorado law thus specifically provides that home-based education cannot be considered a private and nonprofit school. The student contends that the "private school or facility" referenced in 34 C.F.R. §300.403 differs from the "private and nonprofit school" referenced in Section 22-33-104.5 but provides no rationale for this proposed distinction. In fact, the term "private and nonprofit school" appears nowhere else in Colorado statutes. No basis exists to determine that a "private and nonprofit school" is anything other than a "private school" (a term used throughout the Colorado statutes) which is nonprofit or that it is other than a "private school or facility" as referenced in 34 C.F.R. §300.403.

In reviewing Section 22-33-104.5 regarding home-based education, it is also clear that designating home-based education as a private school would be contrary to the clearly expressed legislative intent. The legislature sought to create an educational alternative beyond school district supervision and control with a minimum of state involvement. The legislature effectuated this objective in part by exempting home-based education from the definition of a "private school" and thus the added requirements applicable to such a private school.[3]

Colorado statutes also specifically differentiate between home-based education and private schools and use the terms to designate separate entities. For example, in the statutes regarding home-based education, a home-based education program is distinguished from a private school in that a student in a non-public home-based education program can participate in extracurricular or interscholastic activities offered by a public or private school.[4]

The Administrative Law Judge thus concludes that a home-school child in Colorado is not enrolled in a private school or facility and that a school district is not required by IDEA to provide special education and related services to such a student. This result is consistent with the reasoning enunciated in *Robertson County School System v. King*, 22 IDELR 451 (SEA 1995):

> It is axiomatic that a school system's obligation to provide free appropriate public education extends only to those students who are enrolled in that school system. Until the child is enrolled in the system, the system has no responsibility to evaluate or formulate a program for that student.

The student contends that even if a student is not enrolled in a public or private school, the school district must nonetheless offer special educational and related services based on the general legislative mandate that such services be made available to students with disabilities. In support of her contention, The student cites *Edgerton School District*, 20 IDELR 126 (SEA 1993), which found that for the purposes of providing special education services, a Wisconsin school district was not required to treat private home-based students as if they were enrolled in private schools. That decision addressed a home-schooled student whose parents refused special education services. Based on the overall objective of IDEA to provide a FAPE to all children with disabilities, *Edgerton* concluded that a school district must make available special education services [and to actually provide them if requested] despite the fact that the student is not enrolled in a private school.

The general mandate of IDEA to provide special education and related services to children with disabilities, relied on in *Edgerton*, must be read in conjunction with the specific regulations outlining the parameters of that mandate. Given the specific provisions of IDEA and its regulations requiring special education services to be provided to children with disabilities enrolled in public and private schools, the absence of any federal mandate in relation to home-based education, the fact that the student here is being home-educated, and the Colorado law minimizing any state or district control over home-based education, the Administrative Law Judge finds that the student here is not enrolled in a private school and as such is not entitled to special education services.

2. Effect of Home-Educated Status on Relief Requested. Since the student in this case is not entitled to special education or related services, she is not entitled to the home tutoring she requested. In addition, the fact that she is being home-schooled and does not wish to attend a District school precludes her from obtaining any of the other relief requested, as that relief is unrelated to her current circumstances. It is axiomatic that relief requested in a due process hearing must be related to the claims asserted and must be reasonably calculated to remedy deficiencies found in relation to that student's education. Here the student asserts that the District denied her a FAPE, yet none of the relief requested would have any effect on her current education.

For example, as a home-educated student, the student is not covered by District policies, and thus no review of or change in those policies regarding student and personnel conduct would affect her or remedy any denial of a FAPE. Likewise, since she does not attend a District school, any training provided to District personnel could have no effect on the student, and thus it could not remedy any failure to provide her a FAPE.[5] An investigation of the teacher at issue or even his requested dismissal is also unrelated to a child with disabilities such as the student who does not attend any District school.

In addition, in relation to the student's participation in eighth grade graduation ceremonies, the parties reached a partial stipulation. The remaining issue asserted by the student appears to be whether she has met the testing and other requirements to be eligible for graduation. The student does not assert that this issue arises from her disability or is related to a FAPE, and thus it is not a proper issue for this due process hearing. *See* 34 C.F.R. §§ 300.504(a)(1) and (2) and 300.506(a) [affording parents the right to a hearing regarding issues of identification, evaluation or educational placement of the child or the provision of FAPE to the child].

Since there is no authority to grant any of the relief requested by the student, the student's request for a due process hearing was properly dismissed by the IHO. Under these circumstances, the Administrative Law Judge is not called upon to address the third issue on appeal, which asserts that the IHO erred in dismissing the student's claim that the District's failure to educate her in a safe environment denied her a FAPE.[6] The IHO concluded that this issue was "not a proper issue for a due process hearing under the IDEA because it is outside the jurisdiction of a due process hearing."

In this Decision Upon State Level Review, the Administrative Law Judge specifically declines to adopt the reasoning and conclusion of the IHO regarding the student's safe environment claim. Contrary to the finding of the IHO, the Administrative Law Judge determines that had the student requested relief which was authorized under IDEA for children with disabilities in her circumstances, she would have been entitled to a hearing to allow her to attempt to prove that the alleged harassment and assault arose from her disability, as alleged, and that the magnitude of these events was such that it denied her a FAPE. *See* 34 C.F.R. § 300.504(a)(1) and (2) and 300.506(a) [affording parents the right to a hearing regarding issues of identification, evaluation or educational placement of the child or the provision of FAPE to the child].[7]

CONCLUSIONS OF LAW AND DECISION

1. The Administrative Law Judge has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*; Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.*, C.R.S. (1995 & 1996); and Part II, Section A, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1995-97.

2. The Impartial Hearing Officer had no authority to grant any of the relief requested by the student in this due process hearing pursuant to either IDEA or ECEA[8]. The District is not required to provide special education nor related services to the student under the circumstances of this case, because the student is being home-educated. The IHO thus properly dismissed the student's request for a due process hearing, and the Administrative Law Judge affirms this dismissal.

3. As the Administrative Law Judge has affirmed the IHO's dismissal on the above grounds, she need not address the issue of the IHO's dismissal based on her authority to consider a claim of denial of a FAPE due to the failure to provide a safe environment. The Administrative Law Judge specifically declines to adopt the IHO's reasoning and conclusion regarding this issue.

4. This decision of the Administrative Law Judge is the final decision on state level review except that any party has the right to bring a timely civil action in an appropriate court of law, either federal or state. State Plan, Part II, A, VII, B, 10 and 2220-R-6.03(12) (1 CCR 301-8).

DONE AND SIGNED

February 28, 1997

Nancy Connick
NANCY CONNICK
Administrative Law Judge

FOOTNOTES

[1] The holding in *Susquehann Township School District*, 21 IDELR 330 (SEA 1994), cited by the student does not support the student's contention. One of the issues raised in that due process hearing was whether the school district had the right to conduct an evaluation. The IHO entered an order granting the school district this right without affording the parents an opportunity to be heard. The reviewing officer overturned this ruling and found that the mere convening of a hearing does not insure due process. The IHO in the case at hand did not render a ruling based on the evidence of one party alone. To the contrary, she heard no evidence and ruled as a matter of law that the student had failed to state a claim cognizable under IDEA and was requesting relief which the IHO had no authority to grant.

[2] As reflected in the IHO's Order, the parties stipulated to the student's request that a staffing be conducted prior to the time that the student returns to public school to develop an appropriate IEP (including specified related services) and that the student's regular education teachers attend that staffing. They further stipulated that if not all of the regular education teachers are able to be present, they will be made aware of the requirements of the IEP following the staffing.

[3] For example, Section 22-1-114, C.R.S., allows school districts to request monthly reports from private schools, and Section 22-3-101, C.R.S., requires private schools to provide eye protective devices for use in their schools.

[4] Colorado statutes contain other references differentiating between home-based education and private schools. Section 22-30.5-106(2) prohibits a private school *or* a non-public home-based education program from filing an application to convert to a charter school. The use of "or" between the reference to both entities indicates that they are in fact different entities. In addition, in the State Department Education Act of 1964, Section 22-2-114.1(3)(a), the term "dropout" is defined as a person who leaves school before completion of a high school diploma and who does not transfer to another public or private school *or* enroll in an approved home study program. Again the terms "private school" and "home study program" are used in the disjunctive.

[5] An additional reason exists for the IHO's lack of authority to request that the District arrange for CDE to review its policies concerning student and employee conduct and the disciplinary/grievance procedures to review such conduct. The only parties to this proceeding are the student herself and the District. While CDE has designated the Administrative Law Judge to issue decisions on state level review of IDEA due process hearings, it does not by this action make itself a party. The Administrative Law Judge thus has no

authority to direct CDE to undertake the review of District policies as the result of this hearing.

[6] Based on her Amended Supplemental Disclosure Statement, as supplemented at the hearing before the IHO, the student asserted that she was subjected to harassment and was assaulted by students and staff at Las Animas Middle School based on her disability. The student asserted that her grandparents had talked to the Principal and Superintendent regarding these incidents but that the District did little to correct them. The alleged incidents supporting these claims are as follows:

a. An incident on September 14, 1994, when the student was chewing gum in class and her teacher grabbed her chin, forced her mouth open, and reached in her mouth to remove the gum and put it on her nose, causing bleeding in the mouth.

b. Just following this incident, the special education teacher told the student to "shut up because she was disrupting the class with her crying."

c. The student was subjected to ongoing harassment by students and staff, including name-calling (*i.e.*, being called a bag lady for carrying her books) and being hit with a locker door. It is unclear whether any further name-calling is alleged.

[7] The Administrative Law Judge finds *Gaither v. Barron*, 924 F. Supp. 134 (M.D. Ala. 1996), does not support a contrary conclusion. That case involved a claim apparently pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* or Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* of a hearing impaired student that her teacher harassed her based on her disability. The Court acknowledged that although neither federal law at issue specifically addressed harassment claims, such claims are actionable under those laws. The Court found that in order to establish liability, the student was required to demonstrated that the alleged harassment was based on her disability. The Court dismissed this claim based on a finding that the student had failed to allege facts sufficient to support that the harassment was based on her disability. The Court ruled as follows: "The plaintiff cannot raise a state tort claim to the level of a federal disability claim merely because the plaintiff had a disability at the time the event occurred." *Id.* at 137.

In the case at hand, the student asserted at hearing that the harassment and assault were based on her disability. Although the IHO apparently assumed that the harassment and assault were unrelated to the student's disability, the student should have been given an opportunity to prove the contrary, if she had otherwise requested relief authorized pursuant to IDEA. *See Berlin Area School District*, 24 IDELR 492 (SEA 1996) and 24 IDELR 795 (SEA 1996) [due process hearing addressed issue of environment free from harassment]; Colorado Case No. 96:10(a) [IHO denied the school district's motion to dismiss the issue of education in a safe environment and held without elaboration that there is a minimum level of safety inherent in a FAPE].

[8] Although the student cited ECEA in her request for the due process hearing, neither she nor the District relied on it in this matter.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to: Melinda Badgley Orendorff, Esq., 409 N. Main, Suite 413, Pueblo, CO 81003; Jill S. Mattoon, Esq., Peterson & Fonda, P.C., 650 Thatcher Building, P.O. Box 35, Pueblo, CO 81002-0035; and Gretchen A. Eberhardt, 8441 West Bowles Ave., Suite 210, Littleton, CO 80123; and via Interoffice Mail to: Myron Swize, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203, on February 28, 1997.

Peggy Buyaki

Secretary to Administrative Law Judge

ed9613st.dec

Case No.: **L96:120**

Status: Impartial Hearing Officer Decision

Key Topics:
Free Appropriate Public Education (FAPE)
Special Education Referral
Section 504
Private School Placement

Issues:

- Did the district illegally deny the plaintiff a free appropriate public education and services under Section 504 by failing to refer him to special education after suspecting that he had a disability?
- If so, what is the appropriate remedy?

Decision:

- The district denied the student a FAPE and services under Section 504 by failing to refer the student to special education and by failing to follow the provisions of the Comp Plan preliminary to obtaining permission for an assessment.
- The district shall reimburse the petitioner for tutorial costs, tuition for summer school and placement at a private school for that following academic year.

Discussion:

- Weight of case law in regard to tuition reimbursement and procedural safeguards.
- IHO orders

NOV 25 1997

Due Process Hearing L-96-120

In the matter of: [redacted], By and through his Mother and Legal Guardian of the Student, [redacted] Petitioner, v. LITTLETON PUBLIC SCHOOLS, ARAPAHOE NO. 6, Respondent.	FINDINGS AND DECISION of Impartial Hearing Officer Joseph M. Goldhammer

INTRODUCTORY STATEMENT

The Impartial Hearing Officer (IHO) heard this case over the course of 11 days, December 4, 5, 6, 17, 18, and 19, 1996 and January 6, 7, 13, 20, and 21, 1997, at the Littleton Education Services Center, 5776 South Crocker Street, Littleton Colorado. Jurisdiction is conferred by 20 USC §1415 (b)(2), 34 C.F.R. §300.506, Part VII of the current Colorado State Plan, and 34 C.F.R. §104.36. The Petitioner, B.F., appeared *pro se* through his mother, and Darryl Farrington represented the respondent, Littleton Public Schools, Arapahoe No. 6, (the District). The Colorado Department of Education received a request for hearing on October 24, 1996. The parties submitted opening briefs on or about April 15, 1997, and reply briefs on or about June 5, 1997. The IHO heard oral arguments on July 7, 1997, at the hearing location. The parties stipulated for extensions of time within which to reach a final decision and mail a copy to the parties to November 24, 1997, pursuant to Part VII.B.4.b.(1) of the current Colorado State Plan.

II.

ISSUES

After considering all evidence, legal argument, and the statements of the issues in the Prehearing Memorandum and Order dated November 26, 1996, the IHO has determined the following as the issues in this case:

1. Did the District illegally deny B.F. a free appropriate public education and services under § 504 by failing to refer him to special education after suspecting that he had a disability?

2. If so, what is the appropriate remedy?

III.

FINDINGS OF FACT

The IHO makes the following findings of fact based on the evidence adduced at the hearing:

1. B.F. was born on March 22, 1977. From kindergarten until the sixth grade, he attended public school at Cherry Hills Elementary School in the Cherry Creek School District. Towards the end of his second grade year, in 1986 he received special education services for emotional and learning disabilities, with the behavioral difficulties as the main concern. (Resp. Ex. 1 p. 3). As a precursor to receipt of the special education services, R.F., the mother of B.F., signed consent forms for assessment of B.F. on at least two occasions, in which she received a full notification of her rights as a parent under the laws pertaining to special education. (Resp. Ex. 2 and 3).

2. During the summer of 1986, after B.F. had been enrolled in special education for approximately two months during the previous school year, R.F. removed B.F. from the special education program. (Resp. Ex. 4). R.F. decided that private therapy for learning disabilities would be better for the student. (Jt. Ex. 84). B.F. demonstrated extreme sensitivity to being separated from the remainder of his classmates for his special education services, because he felt most uncomfortable with identification among his peers as being different. Therefore, his parents had private therapy for learning disabilities in the third grade after school. Every year he attended the Cherry Hills Elementary, his teachers referred him for special education services, but the parents only availed themselves of services once, in the second grade.

3. In the middle of his sixth grade year in early 1990, B.F. transferred to Goddard Middle School in Littleton Public Schools Arapahoe No. 6 (the District). Shortly before the transfer, the records from the Cherry Creek District show that R.F. informed that District that she did not want

his special education records to follow him to his new school. While the sixth grade teacher at Cherry Hills had referred B.F. for special education services, R.F. opposed direct intervention and did not want any special education services. In her view, intervention did not work as the result of B.F.'s embarrassment at being singled out for services, although it might work at some time in the future. (Pet. ex. 2 p. 4). When R.F. signed the release to transmit B.F.'s educational records to Goddard Middle School, she expressly excluded the special education records. (Jt. Ex. 82 p. 22).

4. B.F. completed Middle School without special education services and entered Heritage High School in Littleton in the fall of 1992. By the second semester of freshman year, B.F.'s grades had deteriorated to D's and F's with one exception. (Jt. Ex. 24). B.F. responded in several ways. First, she requested that Margaret Kruse become B.F.'s guidance counselor. She also contacted Denver University to test B.F. for learning disabilities, but encountered a six month wait at that institution. R.F. did not consider the Littleton Schools for this evaluation, because B.F. remained sensitive to testing, to being singled out, and to admitting that he might have a disability. In fact, the family could barely say the words "learning disabilities" around the house because of B.F.'s resistance.

5. In September of his sophomore year Margaret Kruse assumed responsibilities as B.F.'s guidance counselor, at the request of R.F. (Jt. Ex. 54). R.F. let Kruse know that B.F. would undergo testing at DU in October of 1993, against his wishes, and also that he had some history of therapy for learning disabilities in the third grade. Kruse then checked with B.F.'s teachers and found his performance unsatisfactory in that he frequently appeared for class late if at all, failed to turn in assignments, and that when he did appear, he often did not have his books and supplies. (Jt. Ex. 8).

6. Although B.F. suffered significant anxiety during the testing process at DU, he

successfully completed it, and on November 3, 1993, the mother and B.F. had a conference with Dr. Margaret Riddle, the Director of the Child Learning Disability and Neuropsychology Clinic at the University of Denver, at which Dr. Riddle informed them of her recommendations, including various methods to deal with nonverbal learning disabilities and counseling to deal with his emotional problems. At the mention of counseling, B.F. erupted, stormed out of the room, and began hitting and kicking the walls and furniture in the building. The campus police appeared, and B.F. eventually calmed down. However, in the car on the way home, B.F. lost control again, slamming a cup of coffee against the dashboard. At the time of this meeting, Dr. Riddle had not yet prepared the written report (Jt. Ex. 3).

7. On November 15, 1993, on the recommendation of Dr. Riddle, B.F. saw Dr. Ron Rabin, a psychiatrist, regarding his emotional problems. Dr. Rabin reported lack of cooperation by B.F. and a "not totally clear" diagnosis of "attention deficit disorder and rule out bipolar." Dr. Rabin only saw B.F. on one further occasion during the 1993-94 academic year, on December 13, 1993. Subsequently, the two did not meet for counseling again until the fall of 1994.

8. Meanwhile, on November 17, 1993, R.F. met with Ms. Kruse and reported that the testing at DU had resulted in recommendations from Dr. Riddle that B.F. had learning disabilities and needed counseling for his emotional condition. She told Kruse that counseling had begun with Dr. Ron Rabin. (Jt. Ex.11). Kruse took no immediate action as the result of this conversation with B.F.

9. Dr. Riddle mailed the DU report (Jt. Ex. 3) to R.F. early in January, 1994. The report contains a detailed analysis of the testing, but, as a primary concern, suggests that B.F. may have Bipolar Mood Disorder, consistent with a family history of that condition. (Jt. Ex. 3 p. 5). Dr. Riddle strongly recommends that B.F. have a psychiatric evaluation as an initial step with Dr. Ron

Rabin. Dr. Riddle urges the pursuit of approaches to address nonverbal learning disabilities only after the student is able to address his academic difficulties, when his emotional problems stabilize. The suggestions to remediate the learning disabilities included tutoring, intensive help in math with the use of manipulative materials, possible abandonment of the study of foreign language, computerized assistance with spelling, and extra time on tests.

10. R.F. called for an appointment to see Ms. Kruse on January 19, 1994, and brought her the written report on January 24, 1994. Kruse asked R.F. whether she wanted a referral to special education at that meeting, and R.F. responded that she did not want a referral at that point. Further, R.F. asked Kruse not to reproduce the report because B.F. had not seen it yet. However, she also asked Kruse to convey the recommendations in the report to B.F.'s teachers and to direct them not to discuss the contents of the report with him. Additionally, R.F. asked Kruse to send the one copy of the report in the hands of the school to the school psychologist, Marilyn Shroyer, for a determination of whether the student would qualify for special education services. Kruse promptly complied with the requests by sending a memo to B.F.'s teachers on January 27, 1994, (Jt. Ex. 14) and by transmitting the DU report with a note to Marilyn Shroyer asking whether B.F. would qualify for special education services on the same date. (Jt. Ex. 16). At that meeting, R.F. informed Kruse that DU would raise the IQ scores form the testing if so requested by the parents, which could have an influence on B.F.'s eligibility for special education services for learning disabilities, but the parent never requested such a modification. Furthermore, the DU report itself does not reflect a willingness to modify test scores.

11. In early February, 1997 Shroyer responded to Kruse's request for information regarding eligibility for special education by writing her a note which states that B.F. may qualify for special

education under the category of emotional disabilities if the psychiatric diagnosis comes back bipolar. However, to assess eligibility based upon learning disabilities, Shroyer asked for detailed test scores not available from the DU report itself. (Jt. Ex. 17). Kruse reported this information to R.F. by telephone, and B.F. obtained the scores from DU and promptly provided the detailed test scores to Kruse for further transmittal to Shroyer with a note instructing school officials not to reproduce them. By mid February, Shroyer responded to the inquiry by writing on the back of the envelope in which she received the scores, "Academic Scores must be below 5.4. Doesn't qualify," and by returning the envelope to Kruse. (Jt. Ex. 18 & Pet Ex. 13). Shroyer's terse note referred to the formula determining eligibility for special education in learning disabilities, which required a significant discrepancy between test scores purporting to measure ability and achievement, thereby pointing to the potential that a psychological processing disorder, a learning disability, could account for low achievement. In B.F.'s case, the test scores revealed no such discrepancy. Kruse then promptly apprized R.F. that B.F. did not qualify for special education services based upon learning disabilities in approximately mid-February, 1994.

12. B.F. testified that she declined a referral to special education in early 1994, despite the suggestion of Kruse, because she labored under the impression at that time that a referral entailed more tests, protocols and evaluations, which B.F. would strongly resist. She testified that she never told Kruse that she opposed appropriate special education services themselves.

13. Despite Shroyer's suspicion expressed in the note to Kruse of early February, 1994, that B.F. may qualify for Special education services if his psychiatric diagnosis came back bipolar (Jt. Ex. 17), the School District made no efforts to determine the outcome of the psychiatric evaluation, and did not offer the parents an assessment of that suspected diagnosis at the expense of the school

district. In fact, after seeing Dr. Rabin in December, 1993, B.F. saw no physician for his suspected bipolar condition until the late summer or early fall of 1994.

14. In March, 1994, Kruse and R.F. had discussion about referring B. F. for a student review. (Jt. Ex. 19). Student review is a regular education process at the school building level at which all interested parties may participate in determining how to meet the unique needs of the student. (Jt. Ex.37 p. 40). The participants in that process decide whether a student's needs can be met through modifications in regular education or whether the student is suspected of having a disability, in which case the student is referred for special education placement or services under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Hence, while general education personnel conduct the student review within the context of regular education, often students obtain a referral to special education by proceeding initially through student review.

15. The Littleton Public Schools Special Services Comprehensive Plan and Procedures Manual (Jt. Ex. 37) does not require parental consent for a referral to student review. Hence, any interested person such as parents, teachers, guidance counselors or school administrators can initiate that process. In this respect, the Littleton process resembles those of numerous other school districts, including the Cherry Creek School District. However, no person initiated that process during B.F.'s sophomore year at Heritage High School.

16. Ms. Kruse'suspected that B.F. had a disability beginning at least in early 1994, when she read the DU report. Her testimony that she repeatedly suggested to R.F. that she refer B.F. for a student review and for special education confirms that she held this suspicion.

17. B.F.'s grades in the spring semester of his sophomore year (1994) improved slightly. However, he still received F's in half of his eight courses. (Jt. Ex. 24). However, during the summer

of 1994, B.F. participated in an Outward Bound program, where he met a peer who excelled in athletics and did well in school despite disabilities, either Attention Deficit Disorder (ADD) or Learning Disabilities. B.F. learned to admire this individual, and for the first time opened up to the notion that he might have disabilities similar to those of his new friend. During the same summer, R.F. learned about Attention Deficit Disorder through her friend whose son allegedly had learning disabilities. Upon B.F.'s return home at the end of the summer, R.F. convinced B.F. to ascertain whether he had ADD by seeking a professional opinion. Additionally, R.F. convinced B.F. to initiate tutoring with a teacher at Denver Academy (DA). She also contacted Marilyn Shroyer directly for the first time and told her that she wanted to determine whether he son had ADD. Shroyer, in a telephone conversation, recommended reading in the field of ADD, and referred R.F. to a Dr. Lewis for an assessment. B.F. also saw a Dr. Clark, but when these doctors told B.F. that he needed extensive counseling, or otherwise did not satisfy him, he returned to Dr. Rabin on October 17, 1994, who prescribed a medication for ADD, Wellbutrin. B.F. saw Dr. Rabin several times in late 1994. On November 15 of that year, Dr. Rabin substituted Ritilin for the Wellbutrin, and B.F. has been on that medication from then to the time of the hearing.

18. Consistent with her other activities to obtain help for B.F., R.F. also referred him for student review in the fall of 1994. (Resp. Ex. 5). She initiated this referral by calling Ms. Kruse and letting her know that she suspected that B.F. had ADD on October 14, 1994. (Jt. Ex. 40). Kruse promptly filed a request for student review form, indicating that the mother and Dr. Shroyer requested the consultation for "possible ADD and achievement problems." (Resp. Ex. 5). Kruse also made a note in B.F.'s file dated October 14, 1994, that she had filed the paperwork for a student review and that the procedure was "looking toward staffing for Spec. Ed." (Jt. Ex. 26). The note

mentions Marilyn Shroyer, that ADD was possible, and that since B.F. was a junior, the situation was critical. (Id.) Hence, Shroyer and Kruse suspected or should have suspected that B.F. had a disability in the fall of 1994.

19. Dr. Jane Veech, Assistant principal at Heritage in charge of all student reviews, scheduled the student review meeting for November 11, 1994, for a period of 1 ½ hours. (Jt. Ex. 56). At various times, B.F.'s science teacher, algebra teacher, Marilyn Shroyer, Ms. Kruse, and Jane Veech attended the meeting from the school, along with B.F. and both parents. Veech conducted the meeting. She had received a copy of the referral form (Resp. Ex. 5) with the DU report attached. (Jt. Ex. 3). All parties agree that the participants at the meeting discussed and agreed upon remediation for B.F. similar to the recommendations in the DU report, in response to the expression of the parents that they were "interested in accommodations." The parents informed the group that they were providing tutoring, which started six weeks earlier, through faculty member Mark Twarogowski at Denver Academy and that Blake did not want psychological counseling. Thereafter, the meeting broke up in a great turmoil when B.F. demonstrated extreme anger with his mother for interfering with his life. His mother had urged the algebra teacher to advance B.F. to the next mod or level despite a failing grade overall, because he achieved high scores on the tests in the course. After the meeting dissolved, and R.F. stormed out, a new meeting convened in the principal's office with at least Ms. Kruse, R.F. and the principal, to attempt to resolve the issue regarding algebra.

20. Three exhibits memorialize the student review meeting, Ms. Kruse's notes (Jt. Ex. 29), Dr. Veech's notes, (Pet. Ex. 39), and the memorandum summarizing the results of the meeting to B.F.'s teachers, (Jt. Ex. 72). The discussion concerning special education which is documented in the notes refers to B.F.'s ineligibility for LD services based upon an insufficient discrepancy between

his achievement and IQ scores. The documents lack any discussion regarding whether the attendees at the meeting suspect B.F. qualifies for services based upon a potential emotional disability or ADD. Furthermore, the group reached no clear consensus regarding whether B.F. should be referred for services under §504, based upon his suspected disabilities. Ms. Kruse and R.F. came away with the impression that the school served B.F. under §504 by virtue of exhibit 72. The written record does not document that B.F. was offered special education services or §504 accommodations of any kind, including an assessment. The IHO finds due to the lack of any documentation, the School District did not offer B.F. a referral for an assessment for services under special education or §504 at the student review meeting of November 11, 1994. Likewise, despite her knowledge of special education based upon the services afforded her son in second grade, R.F. never directly requested special education services for ADD or ED, but did make a "request for accommodations," which should have been understood to constitute a request for services under §504.(Pet.Ex.39).

21. On November 14, 1994, R.F. wrote a note to Dr. Veech in which she expressed her approval of the student review meeting on November 11, 1994, except for the aspects of the meeting concerning algebra, and apologized for storming out of the meeting at the end. (Jt. Ex. 55).

22. R.F. does not contend that she sought an assessment for ADD from the School District, but testified that she hoped that B.F. would be staffed into special education for ADD because the door seemed shut with respect to LD.

23. After the student review meeting of November 11, 1994, Dr. Veech issued, the memorandum to B.F.'s teachers which directed them to make modifications to attempt to assist him in improving his performance in school. (Jt. Ex. 72). She notes in the memorandum that B.F. "has been taking medication for the last three weeks for ADD." She also notes that, "Marilyn Shroyer

computed the discrepancy between his scores to determine if he qualified for Special Education; he did not." However, the discrepancy formula computed by Shroyer would determine whether or not a reasonable person would suspect that B.F. might qualify for special education services for learning disabilities, but not for ADDor emotional disabilities. The written record contains no evidence that the parties at the meeting considered whether B.F. might qualify for special education under ADD or emotional disabilities.

24. B.F.'s first semester junior year grades show that the modifications implemented as the result of the student review meeting had little effect. He received all F's that semester, with the exception of one C in algebra, the subject in which he received tutoring from Mark Twarogowski at Denver Academy.

25. Approximately two to three weeks after the beginning of the spring semester of 1995, R.F. called Ms. Kruse to ask whether the memorandum to teachers by Jane Veech (Jt. Ex. 72) had been sent to B.F.'s teachers for second semester. Kruse had not yet done that, and did it immediately on February 8, 1995. (Jt. Ex. 44).

26. By the end of the second semester of his Junior year (1995), B.F.'s grades hardly improved. He received six F's two D's and one B. The B was in Gymnastics. (Jt. Ex. 24). Hence, out of the 169 credits he attempted in his first three years of high school, he completed only 79 of them. (Id.). R.F. then enrolled B.F. in summer school at Denver Academy where he took two courses, one in algebra and the other an ACT preparation course. He achieved passing grades in those courses. (Pet. Ex. 48). R.F. then withdrew B.F. from Heritage High School on the first day of the fall semester in 1995, and enrolled him as a full time student in Denver Academy. He attended that private school, where his family paid tuition, during the entire academic year of 1995-96, and

also attended summer school in 1996 after which he graduated from Denver Academy. Grade reports from his first three quarters at DA show that he earned all passing grades in the A and B range with one C+. (Id.)

27. Before withdrawing B.F. from the District, R.F. did not complain to the officials of the District regarding the education he received there. Further, she withdrew him without prior notice to the District.

28. During the early part of 1996, while B.F. was enrolled at DA, R.F. approached the officials at the Heritage High School about making arrangements for B.F. to graduate, since she was not certain how B.F. would ultimately fulfill his graduation requirements. Also, R.F. began to suspect that the District committed "irregularities" in the handling of the education of B.F. She met with the principal, Mr. Sekich, and Ms Kruse on February 12, 1996, and subsequently with Elaine Worrell, on March 6, 1996. In the meeting with Ms. Worrell R.F. requested money compensation for B.F.'s tutorial and tuition costs at Denver Academy, based upon the alleged failure to provide a free appropriate public education by the District. (Jt. Ex. 80). At this meeting, R.F. referred to the memorandum to teachers of November 15, 1994 as a §504 plan, an inaccurate description.

29. In response to the request for reimbursement, Ms Worrell met with several members of the staff at Heritage and the District's attorney to discuss the issues on March 14, 1996. (Pet. Ex. 33). On the same date, Worrell sent R.F. a letter declining her requests for reimbursement and transmitting several documents relating to B.F.'s alleged disabilities and excerpts from the Colorado State Plan regarding rights to appeal special education matters. (Pet. Ex. 25). R.F. and Worrell again met on April 2, 1996. On April 4, 1996, Counsel for the District wrote a letter to R.F. (Pet. Ex. 26) in which he again denied reimbursement and enclosed a copy of the District's standard Notice of

Procedural Safeguards. (Pet. Ex.14). R.F. then requested from Worrell via voice message materials maintained by the District relating to payment of tuition at private out of District facilities, and Worrell responded by letter of April 15, 1996, stating that no such materials existed, and that R.F. might request a due process hearing at this point. (Pet. Ex. 27). Finally, on May 9, 1996, counsel for the District wrote to R.F. in response to her continuing expressions of concern, refusing to change his advise to the district, and offering referral, assessment, and placement in an appropriate program if warranted. (Pet. Ex.28). He further states, "if you are now willing to consent to referral and assessment, let us know and we can get that under way." The attorney also informs R.F. that, while it is unusual for the assessment and staffing process to result in a determination that a student could not be educated at Heritage, it was not impossible.(Id.) R.F. did not accept the offer for an assessment at that time, because she had already made plans with Denver Academy for B.F.'s graduation at the end of the summer of 1996.

30. On September 12, 1996, R.F. sent a request for hearing to the Counsel for the District. (Pet. Ex. 30). However, the Colorado Department of Education did not receive that request until October 24, 1996, due to a mediation which intervened.

31. The District's Comp Plan and testimonial evidence at the hearing established the procedures leading to the provision of special education services and reasonable accommodations under §504. Until the fall of 1995, when the District implemented new §504 Guidelines, (Pet. Ex. 38), the District applied identical procedures to determine the eligibility for services under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq. and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Under this unified procedure, the District normally conducts a student review, unless a delay for consideration of alternatives would not be satisfactory.

(Pet. Ex. 37 p. 46). At the student review, a group of individuals knowledgeable about the student analyzes information already on hand regarding the student to make a determination whether the student should be referred to special education, for § 504 accommodations or whether some other alternatives should be pursued within the confines of regular education. If the District suspects that a student has a disability, it must refer for special education. If the student is referred to special education, the parents and a representative of the special education department hold a subsequent meeting at which that representative seeks parental consent for an assessment and advises the parents of their procedural rights. The two distinct meetings separate student review, a general education function, from the subsequent special education process.

32. Prior to obtaining parental consent for an assessment, special education personnel conduct a preliminary assessment consisting of a review of all pertinent information available to the school without parental consent to determine the need for additional assessment procedures. The special education personnel then inform the parents of the data they already have and of the additional information which must come through the assessment process.(Id. at 46). Then, within thirty days of the referral, after notification of the parents of the nature of the proposed new assessments, the special education personnel engage in procedural safeguard counseling with parents and seek written parental permission of initial assessment. (Id. at 47). The Littleton Comp Plan requires detailed discussion of the proposed assessment with the parents including specification of the reasons for the referral, an explanation of the outline of the referral process, a description of the assessment proposed by the district, an explanation of why the assessment is proposed, and a description of any options concerning the assessment that the district has considered and the reasons why those options were rejected in a face to face conference with school personnel. (Id.)

33. If the parent refuses consent for the proposed assessment, the special education building team must determine if the child or other children may suffer significant harm by the absence of special education services for the child. If not, the team must document that decision on the referral form and proceed no further. If so, the team must document that decision and refer the matter to the Resource Specialist, the position occupied by Elaine Worrell, for a determination whether the District commences legal procedures. (Id. at 48). If the Resource Specialist concludes not to initiate legal action, she must document the district's recommendations and actions.

34. Since the District followed the same procedures for fulfilling its obligations under IDEA and §504 in November of 1994, the memorandum to teachers of November 15, 1994 (Jt. Ex. 72) did not document the provision of services to B.F. under either statute. The District conducted no formal assessment procedures before generating that document, and the DU report relied upon at the student review was not sufficiently recent at that time to form the sole basis for services. Joint Exhibit 72 was neither a §504 plan nor an IEP.

35. In the present case, the District personnel accurately perceived that B.F. resisted testing, psychological counseling, admitting that he might have a disability, and differentiation from his peers. Nevertheless, they also suspected or should have suspected that he suffered from a disability, beginning in early 1994, when they read the DU report.

36. The IHO finds persuasive the testimony of Dr. Porter that parents and students sometimes feel varying degrees of reluctance towards receipt of special education services, and that if parents do not initially consent to an assessment as proposed by the district, in most instances they ultimately agree to an acceptable assessment if cajoled appropriately.

DISCUSSION AND CONCLUSIONS

A. The District Denied B.F. a Free Appropriate Public Education and Services under §504 by Failing to Refer Him for Student Review and Ultimately Special Education Services Beginning in Early 1994.

The District strenuously argues that it did not refer B.F. for special education services because R.F. opposed such a referral adamantly throughout the time period relevant to this case. However, the District has affirmative obligations to refer all students suspected of having a disability to special education, regardless of parental consent. Then, in the "referral process," (defined by the Comp Plan page 47 as referral through staffing), parents may grant or deny consent to preplacement evaluations and the initial placement of the student in accordance with 34 C.F.R. §300.504(b)(1).

The duty of the District to refer a student suspected of having a disability to special education derives from IDEA, the regulations, the Colorado State Plan, and the Littleton Comp Plan. The statute itself in 20 U.S.C.§1412 (2)(C) requires the state to assure that all children who are disabled, regardless of the severity of their disability, and who are in need of special education and related services be identified, located and evaluated. The regulations in 34 C.F.R. §300.128 contain the same requirement. The Colorado State Plan provides in Part V. D. 1. page 12 that Districts "establish procedures for the assessment of . . . youth *suspected of having a disability*. . ." (emphasis added). To comply with this requirement, the Littleton School District, adopted its Comp Plan (Pet. Ex. 37). The Comp Plan provides as follows:

> **D. Special Education Referral Process**
>
> The Littleton Public Schools ensures that all students, birth to 21, for whom there is a *concern about a suspected handicapping condition*, shall be referred to special education for full assessment and staffing. The referral process shall be accessible to *any person, association, or agency having an interest in the child.*

(Pet. Ex. 37 p. 46, emphasis added).

Any person having an interest in the child has the authority to refer a student for student review and special education services with or without parental consent. The School must refer a student suspected of having a disability to special education regardless of parental desires, since the word "shall" is mandatory.

The Comp Plan is adopted pursuant to state and federal law. The Rules for the Administration of the Exeptional Children's Educational Act 1 CCR 301-8 2220-R-3.02(6) require the School District to develop a Comprehensive Plan. IDEA in 20 U.S.C. §§1413 and 1414 requires the states to specify their means of complying with the Act in State Plans. The Colorado State Plan, in turn, requires all administrative units to approve a local comprehensive plan. Colorado State Plan Part III. B.2. Thus, the Comp Plan is binding on the District.

The term "suspected of having a disability" has no specialized meaning apart from its common usage in plain English. The District or its personnel suspect a student of having a disability when, as an example, the school has medical reports indicating that the student may have conditions which could affect his academic performance and that performance falls below the standards established by the school.

While the Distict's §504 Guidelines (Pet. Ex. 38) do not directly apply, since they did not go into effect until fall of 1995, when B.F. withdrew from Heritage, they lend support to the proposition that the District should have referred B.F. to special education when it suspected that B.F. had a disability. The Guidelines require the District to conduct an individual evaluation and provide parental notice "for any student who, because of a *suspected* disability might need specialized instruction and/or related services." (Id. p. 15)(emphasis added). Hence, a suspicion of disability

disability should instigate the referral process for special education and assessment for potential provision of §504 services. In this regard, the Comp Plan and the Guidelines also comport with the OSEP decision at 19 IDELR 499, cited by the parties, since once school officials suspect a disability, as the result of an initial screening or otherwise, the procedural safeguards of IDEA also apply.

Various officials and representatives of the school district here clearly suspected or should have suspected that B.F. had a disability. Ms. Kruse had such suspicions since early 1994, when she first read the DU report. Kruse testified that she continuously and repeatedly suggested to R.F that she refer B.F. for a student review or for special education, only to encounter steadfast refusals from the parent. These suggestions demonstrate Kruse's suspicion that B.F. had a disability. Marilyn Shroyer, in her note of February 7, 1994, to Ms. Kruse states that B.F. "may qualify for spec.ed. under the ED category if the psychiatric diagnosis comes back bipolar." (Jt. Ex. 17). Hence, Shroyer suspected that B.F. had a disability in February 1994. Likewise, Dr. Jane Veech knew, as the result of the student review, that B.F. might have ADD. The referral to student review (Resp. Ex. 5) states, in Kruse's handwriting, that B.F. has "Possible ADD." Kruse sent that document to Veech. Likewise, Veech authored the memorandum to teachers which resulted from that meeting (Jt. Ex. 72) which states that B.F. "has been taking medication for the last three weeks for A.D.D." Since students with attention deficit disorder may qualify for special education under at least three state defined categories of disability, Ms. Veech along with all those in attendance at the student review meeting should have suspected that B.F. had a disability. Veech's testimony that she read the DU report which Kruse attached to the referral to student review, and that she thought it important for B.F. to receive some special services for his emotional condition also confirms that she suspected a disability in B.F.'s case.

B.F.'s performance in school, while not in itself dispositive of whether he had a disability, when combined with the DU report, and evidence that B.F. took medications for attention deficit disorder, created an irrefutable suspicion of disability. His grades during his years in high school demonstrated extremely poor achievement, clearly warranting concern by all interested parties.

While the District at times openly acknowledges a suspicion that B.F. had a disability, and at others attributes his poor performance solely to a lack of motivation, it defends its position, in either case, based upon R.F.'s alleged consistent opposition to a referral to special education. Admittedly, R.F.'s conduct lent the impression that she wanted to control closely the accommodations and special services offered to B.F., given his resistance to interviews, testing, special treatment and interference in his life. However, in light of his dismal grades, B.F. obviously needed the intrustion of expert help of some kind, and the Comp Plan, wisely, required the District to attempt to determine whether or not that help should come in the form of special education.

In other words, the Comp Plan acknowledges what Dr. Porter and Elaine Worrell convincingly explained in their testimonies, that parents commonly manifest a reluctance to special education placement for a variety of reasons. The Comp Plan requires, in those cases, that District Officials refer the student to special education, regardless of parental objections. At that point, District personnel qualified in special education matters, rather that general education staff, begin handling the matter. Those personnel should be well equipped to deal with the concerns of parents who oppose special education for their children. They prepare a preliminary assessment, based upon the data they have on hand. (Pet. Ex. 37 p. 46). The preliminary assessment enables the special education department staff to inform the parent at the time consent is sought of the data they will need to obtain in the assessment process. Under this provision of the Comp Plan, the parent knows the nature and extent of the assessment before seeing the consent form.(Id.) Then, district officials engage in "procedural safeguard counselling" to advise the parents of their rights under IDEA, in accordance with 20 U.S.C. §1415 and 34 C.F.R. §300.505. The Comp Plan requires an exhaustive disclosure of information by the District, including the reasons for the referral, a detailed explanation of the assessment proposed by the District, an explanation of the options concerning the assessment considered by the District and the reasons those options were rejected, and the reasons for the desired assessment with opportunity for a face-to-face conference with school personnel.(Id. at 47). This conference offers the opportunity for the District to cajole reluctant parents (in the words of Dr. Porter) with highly persuasive force.

Finally, after completing all of the above, the special educators attempt to obtain written parental consent for the proposed assessment. (Pet. Ex. 37 p. 48). Thus, fairly deep into the referral process, parents have their initial opportunity to say no. Prior to this point, the District has the obligation to proceed regardless of the parents' wishes. If the parents refuse permission for the assessment, personnel at the building level determine whether significant harm will result from the absence of special education services. If not, they document that decision and the process ends there. If so, they refer the matter to the resource specialist, in this case Elaine Worrell, for a similar determination, who may chose to initiate legal proceedings to override the parents' refusal. At each step of the process, responsible officials must document their decisions and actions. (Id.).

In the present case, the District failed to follow these procedures in the Comp Plan. The District never referred B.F. for special education, despite the suspicions of several officials that he might have a disability. Hence, the District did not follow any of the steps of the referral process leading up to the presentation of a consent for assessment form to the parents.

The District will argue that pursuing these steps would have been an exercise in futility, and even contrary to the wishes of the parent and student, in view of R.F.'s unyielding rejection of any movement in the direction of special education. The District points out that while B.F. had been referred for special education services every year he attended the Cherry Creek schools, his parents accepted a placement in special education only once for a short period after which his mother removed him to opt for private services. The District reasons that the law imposes no duty to refer to special education in the face of direct parental opposition. The District also cites authority for the proposition that it is not required to attempt to override judicially a parent's refusal to consent to an assessment. *Ackerhalt* 24 IDELR 178.

However, the law requires that the District act, up to a certain point, in the best interests of the student, regardless of expressed parental or student desires. This process assures that if parents ultimately reject an assessment or placement, they do so with a firm understanding of exactly what they reject and with full knowledge of their rights. After District officials qualified in special education matters explain the specifics of the proposed assessment to the parents and inform them of their procedural rights, parents may deny consent for an assessment. The Comp Plan does not require the District to override this decision as long as it documents that the denial of services will not harm the student or others. Up to that point, the District must do its best to serve the student, if it suspects that he has a disability.

These requirements contemplate and seek to accommodate the many parents whose attitudes range from a mild reluctance to an extreme opposition to a special education placement. Dr. Porter testified, in his experience, that after cajoling parents, he has found that most of them ultimately do consent to an appropriate assessment. The IHO here does not find that adhering to the procedures in the Comp Plan would have necessarily ended in refusal by the parents to an assessment tailored to the specific needs of B.F. Potentially, the parties could have found methods to circumvent B.F.'s aversion to assessments. As time became more critical late in B.F.'s high school career, R.F. may have accepted the necessity for special education. The District, to fulfill its obligation ensuring that "all students for whom there is a concern about a suspected handicapping condition, shall be referred to special education for full assessment and staffing," can do no less than complying with the rules it has adopted.

Additionally, while the record amply demonstrates that R.F. attempted to assert firm control over B.F.'s educational program at all times, her actions manifest an ambivalent attitude towards some special measures in B.F.'s behalf rather than resolute opposition to all formal intervention. While she told Ms. Kruse that she did not want a referral to special education when R.F. informed her of the DU findings in late 1993 or early 1994, she also inquired about whether B.F. would qualify for special education in the category of learning disabilities, indicating that she might accept a "referral" if he did qualify, but not for his emotional problems. Although the record demonstrates that R.F. never articulated, in precise words, a request for special education services or for services under §504, she referred B.F. for student review in the fall of 1994, and both parents indicated their interest in "accommodations," at the meeting of November 11 of that year. (Pet. Ex. 39). The record also shows that B.F. thought she had obtained a §504 plan in Joint Exhibit 72, only to learn that she had not when she brought the case to the attention of Elaine Worrell in early 1996. Hence, B.F. was clearly not averse to the concept of §504 accommodations.

The IHO does not accept the Petitioner's argument that she should have received an advisement of her procedural rights at the student review meeting under 20 U.S.C.§1415, 34 C.F.R.

§300.504 and 34 C.F.R. §104.36. Universally, the regulations contemplate pre-referral conferences, such as the student review meeting, as operations of general education. See e.g. 1995-97 Colorado State Plan Part V. C. 2. and Rules for the Administration of the Colorado Exceptional Children's Educational Act 1 CCR 301-8; 2220-R-4.02. However, at the student review meeting of November 11, 1994, the school should have expressly determined the need for a special education referral, based upon whether the school officials suspected that B.F. had a disability. See State Plan Part V. C. and D. If so, the school officials in charge of this general education process, should have called upon the special education resources of the District by referring B.F. to special education. In the referral process the parents would have received notice of their procedural rights from personnel assigned to deal with special education matters.

The District argues that it discharged any obligations it owed to B.F. under IDEA and §504 by implementing the interventions suggested in the DU report at the request of the parents at the student review meeting. The IHO disagrees with this contention. Since the District failed to follow its procedures in obtaining permission for an assessment while B.F. attended Heritage High School, the IHO cannot determine what remedial measures would have emerged from an assessment conducted in accordance with the Comp Plan. Neither party offered any evidence on what results a timely assessment would have produced, and any such evidence would have been speculative in any event. Further, Elaine Worrell testified convincingly that the DU report would not have substituted for an assessment performed by the school district by the time of the student review in the fall of 1994. By then, the testing done at DU was not current. Furthermore, the DU report did not purport to make recommendations or findings to remediate Attention Deficit Disorder or Emotional Disabilities. Doctor Rabin's limited testimony that the recommendations in the DU report, if implemented, would also assist a student with ADD does not convince the IHO that the implementation of those recommendations satisfies the District's potential obligations regarding at least two of his suspected disabling conditions, ADD and ED. The IHO does not accept the District's argument that it fulfilled its obligations to the student by implementing the DU recommendations beginning in the fall of 1994, because it failed to follow its own procedures designed to define precisely those obligations through an assessment of the student.

At this point, the IHO cannot determine whether an appropriate assessment for all suspected disabling conditions conducted promptly in 1994 would have determined that B.F. was eligible for special education services or services under §504. However, rights under IDEA, such as the right to an assessment, extend to students suspected of having a disability, not only those already determined disabled. Furthermore, procedural noncompliance by itself supports a finding that a student has been denied a free appropriate public education. *Tice v. Botetourt County School Board* 908 F.2d 1200 at 1206 (4th Cir. 1990); *Hall by Hall v. Vance* 774 F.2d 629 (4th Cir. 1985). Therefore, the IHO must conclude that the District's failure to follow its own procedures requiring a referral to special education when the school suspected B.F. of having a disability denied him a free appropriate public education. Since at the pertinent times, the District applied the same standards and procedures in fulfilling its obligations under §504, the IHO must conclude that B.F. was denied his rights under that statute as well.

B. The Petitioner Qualifies for Partial Reimbursement for Private School Tuition and Tutoring.

The Respondent correctly points out that a Petitioner requesting reimbursement for tuition and other services seeks relief subject to traditional broad equitable considerations. *Burlington*

School Committee v. Massachusetts 471 U.S. 359, 105 S.Ct. 1996 (1985). The Respondents cite numerous cases in which courts have denied tuition reimbursement because parents have failed to object to the services offered by the District, have resisted the District's attempts to formulate an IEP, and have failed to initiate timely due process proceedings before implementing a unilateral placement. *Ash v. Lake Oswego School Dist* 980 F2d 585 (9th Cir. 1992) is such a case.

However, the Ninth Circuit in *Ash* acknowledged that the failure by a school district to follow procedural requirements may vitiate the defense that the parents failed to object before unilaterally placing the student outside the school district. *Ash supra.* at 589. In this acknowledgment, the Ninth Circuit cited with approval *Hall by Hall v. Vance supra.* In that case, the Fourth Circuit excused the parents' failure to oppose the actions of the District and initiate due process proceedings based upon the District's failure to apprise the parents of the rights and procedures defined in IDEA. In its holding the Court relied upon the emphasis in IDEA on the compliance with procedural safeguards as equally important as following the substantive provisions of the Act. The United States Supreme Court recognized the importance of diligent compliance with the procedures required in the predecessor to IDEA in *Hendrick Hudson v. Rowley* 458 U.S. 176, 102 Sup. Ct. 3034 (1982). The Court stated:

> When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.

Rowley supra. 102 Sup. Ct. at 3050.

Clearly, R.F. did not consult the School District before initiating private tutoring. She also disenrolled B.F. from public school in 1995 without complaining specifically about the education he received there. In fact she wrote to Dr. Veech after the student review meeting declaring her satisfaction with the outcome of that meeting. She had some experience with special education procedures, since B.F. had been referred for services every year he attended the Cherry Creek Schools, and that District did advise her of her rights, albeit several years before the current controversy. She never expressly requested special education services or §504 accommodations for her son in Littleton, although the parents stated their interest in "accommodations."

Nevertheless, the IHO must balance these factors against the heavy obligations of the school district to follow the procedures it adopted in its own Comprehensive Plan. That document clearly establishes the duty to refer *all* students to special education "for whom there is a concern about a suspected handicapping condition. "The Comp Plan makes no exceptions for dissenting parents, who may not act in the best interests of their children, intentionally or unintentionally, with or without complete information regarding the very complicated special education processes. The principal federal law concerning the education of the disabled was enacted in an era when the public school systems in this country excluded or misplaced millions of disabled children. *Rowley supra.* 102 S. Ct. at 3043. In response, Congress imposed obligations upon state educational authorities proactively to identify, locate and evaluate *all* children with disabilities. 20 U.S.C. §1412 (2)(C). According to the Comp Plan, a parent cannot thwart this effort by (in the words of Nancy Reagan) just saying no. A parent's efforts to avoid an assessment of a student suspected of being disabled can only achieve success if school officials document the efforts to obtain parental consent, advise the parents of their procedural safeguards, and make a written determination that failure to assess will not result in harm to the student. (Pet. Ex. 37 p. 46-48). No such effort by the School District appears in the record here.[1]

Also, the IHO has considered the contrast between B.F.'s performance at Heritage and Denver Academy. He did not pass a sufficient number of his courses to progress from grade to grade at Heritage. He graduated from Denver Academy with high marks based upon his performance in two summer sessions and one academic year. However, the importance of procedural compliance by the District militates most strongly in favor of reimbursement. The District cannot do what the parent seems to want all of the time, if that course of action would cause the District to violate the law. It must obey the law, including the rules it promulgates.

Therefore, the IHO will order reimbursement of tutoring and tuition costs incurred before May 9, 1996. In March and April of 1996, the District advised R.F. of all of her procedural rights including her rights to a due process hearing. (Pet. Exs. 25-28). Additionally, on May 9, 1996, counsel for the District offered R.F. in writing referral, assessment, and special education if appropriate. (Pet. Ex. 28). Further, the communication from the District's attorney advised R.F. that, although unusual, an assessment and staffing might result in a placement other than Heritage. At that point, since B.F. attended private school, the District, had no authority to overcome B.F.'s refusal to cooperate in the referral process. As is discussed in footnote 1 of this opinion, a parent can avoid evaluation altogether by removing a student from public school. Furthermore, the District could not reasonably have developed a preliminary assessment without the cooperation of petitioner, since B.F had not been enrolled in the Littleton District for almost a year. R.F. did not respond to the offer for assessment and staffing, and did not request a due process hearing until September 12, 1996, after B.F. had graduated from Denver Academy. (Pet. Ex. 30). Under these circumstances, the IHO will not exercise broad equitable authority to order the School District to reimburse R.F. for the costs of B.F.'s education in the summer of 1996.

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[1] Naturally, a parent can also avoid all evaluation procedures by removing a student from public education altogether. The School District has no constitutional authority to impose procedures on a student whose parent refuses to consent to the assessment and has removed him from the District. This conclusion follows logically from *Pierce v. Society of Sisters* 168 U.S. 510 (1925) which holds that an ordinance requiring all students to attend public school contravenes due process. See *Gregory K. v. Longview School District,* 811 F.2d 1307 (9th Cir. 1987) and Weber, *Special Education Law and Litigation Treatise,* L.P. Publications, 1992 , p. 4:6.

DECISION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. By failing to refer B.F. to special education between January 1994 and May 9, 1996, and by failing to follow the provisions of the Comp Plan preliminary to obtaining permission for an assessment while B.F. was enrolled at Heritage High School during the above period, the District denied B.F. a free appropriate public education and services under §504. Hence, the District shall reimburse the petitioner for tutorial costs incurred in 1994, tuition for summer school in 1995 at Denver Academy, and tuition costs at Denver Academy for the 1995-96 academic year. However, the District shall not be responsible to reimburse tuition costs for the summer of 1996 or for any other costs incurred after May 9, 1996.

Respectfully submitted,

Joseph M. Goldhammer

Joseph M. Goldhammer
Hearing Officer
1563 Gaylord Street
Denver, CO 80206
(303) 333-7751 FAX (303) 333-7758

CERTIFICATE OF MAILING

The undersigned certifies that a true copy of the foregoing Finding and Decision along with a copy of the State Plan provisions regarding state level review (pp. 30-34 - 1995-97 State Plan) has been placed in the United Sates mail, postage prepaid, addressed to:

Certified Mail # P 296 532 770
Return Receipt Requested
[redacted]

Certified Mail # P 860 312 930
Return Receipt Requested
Darryl Farrington
5690 DTC Blvd., Suite 240
Englewood, CO 80111-3232

Certified Mail # P 296 532 772
Return Receipt Requested
Pearl McDuffie
Special Education Services Unit
Colorado Department of Education
201 E. Colfax Avenue
Denver, CO 80203-1704

this 24th day of November, 1997

Joseph M. Goldhammer

Joseph M. Goldhammer

Case No.: **S96:121**

Status: State Level Review

Key Topics: Decision of IHO
Statute of Limitations
Evidentiary Hearing

Issues:

- Whether the IHO erred in dismissing this matter by not viewing the facts in the light most favorable to the plaintiff and by not accepting the facts as alleged as true.
- Whether the IHO erred in dismissing the matter without a hearing in violation of rights under the IDEA to present evidence and confront and cross-examine witnesses.
- Whether the IHO misapplied the statute of limitations by not tolling the statute of limitations for the District's alleged failure to provide adequate notice, by dismissing plaintiff's entire case (when the statute of limitations does not bar the prospective relief requested), and by concluding that the statute of limitations began to run at the latest on May 16, 1994, not October 3, 1994.

Decision:

- Because the IHO did not hold an evidentiary hearing, he was bound to consider the facts in the light most favorable to the child.
- The type of factual determinations necessary to resolve the plaintiff's claim of equitable tolling of the statute of limitations cannot be made without holding an evidentiary hearing.
- The IHO must conduct an evidentiary hearing to consider claim for reimbursement.
- The ALJ does not address the last issue on appeal since an evidentiary hearing on this issue may obviate the need to consider it.
- The ALJ's decision is that the IHO's dismissal of this matter is set aside. This matter is remanded to the IHO for timely proceedings consistent with this decision, including an evidentiary hearing to determine the matters outlined above.

Discussion:

- Standard applicable to Motion to Dismiss.
- Analysis of the IHO's findings.
- Tolling of Statute of Limitations.
- Application of Statute of Limitations to Bar Prospective Reimbursement.
- When the Statute of Limitations begins to run.

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 97-05 S96:121

DECISION UPON STATE LEVEL REVIEW REMANDING TO IMPARTIAL HEARING OFFICER

IN THE MATTER OF:

[redacted], by and through his parents, [redacted],

Appellant,

v.

TELLURIDE SCHOOL DISTRICT R-1, and ANN BRADY, Superintendent,

Appellees.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"); the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq.*, C.R.S. (1995 & 1996) ("ECEA"); and Part II, Section A, VII of the Colorado Department of Education, Fiscal Years 1995-97 State Plan. Oral argument in this matter was held on September 4, 1997, before Administrative Law Judge Nancy Connick. Appellant [redacted], by and through his parents [redacted] and [redacted], were represented by Jason Edward Searns, Esq. Appellees Telluride School District R-1 and Ann Brady, Superintendent (referred to collectively as the "District") were represented by Kenneth A. DeLay, Esq., Miller, DeLay & Crabb, P.C.

PROCEDURAL BACKGROUND

[redacted] ([redacted] or "the child") through his parents [redacted] and [redacted] (collectively "the [redacted]") filed a request for a due process hearing in this matter on September 16, 1996. The request sought reimbursement for past and prospective costs associated with [redacted] tuition and related expenses at a private school. On October 8, 1996, Alan R. Johnson was selected as the Impartial Hearing Officer ("IHO"). The [redacted] requested numerous extensions of the 45-day period to hold a hearing based on their desire to obtain counsel. 34 C.F.R. § 300.512(a). The IHO granted these requests. On May 14, 1997, the District filed a Motion to Dismiss

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and a brief supporting the motion. The District's motion asserted that the child's claim for reimbursement of tuition payments and related expenses in connection with his enrollment in a private school was barred based on the statute of limitations and the doctrine of laches. The child opposed this motion.

Appellants filed a Brief in Support of Petitioner's Response to the Respondent's Motion to Dismiss, dated June 9, 1997, which attached affidavits from [redacted] and [redacted] and an October 3, 1994 letter from Kenneth DeLay to the [redacted]. The District filed a Reply Brief, dated June 18, 1997, which attached a December 14, 1995 letter from William Baseman to the District. In addition, [redacted] filed a Supplemental Brief in Support of Response to Motion to Dismiss, dated June 25, 1997, which attached a Board of Cooperative Services pamphlet. The District then filed a Supplemental Brief, dated June 30, 1997, which attached two Parent Consent - Assessment/Evaluation and/or Examination forms and an affidavit from Sandy McLaughlin, a special education teacher.

The IHO did not conduct an evidentiary hearing in this matter. By Impartial Hearing Officer Ruling dated July 3, 1997, the IHO applied the two-year personal injury statute of limitations contained in Section 13-80-102(1)(g), C.R.S., to dismiss all the child's claims.

The child subsequently filed an appeal. The District filed no cross appeal and concedes that the child's appeal was timely filed. By agreement of the parties, briefs were filed by August 14 and 22, 1997, and oral argument was held on September 4, 1997, at which time this matter was ready for decision. The parties agreed that the Administrative Law Judge would issue the Decision Upon State Level Review by September 15, 1997.

ISSUES ON APPEAL

As clarified in his brief and at oral argument, the child raises three issues on appeal:

1) Whether the IHO erred in dismissing this matter by not viewing the facts in the light most favorable to [redacted] and by not accepting the facts as alleged [redacted] as true.

2) Whether the IHO erred in dismissing the matter without a hearing in violation of [redacted] rights under the IDEA to present evidence and confront and cross-examine witnesses.

3) Whether the IHO misapplied the statute of limitations by not tolling the statute of limitations for the District's alleged failure provide adequate notice, by dismissing [redacted] entire case (when the statue of limitations does not bar the

prospective relief requested), and by concluding that the statute of limitations began to run at the latest on May 16, 1994, not October 3, 1994.

STIPULATED FINDINGS OF FACT

The parties did not enter into a formal stipulation of facts in this matter. Nonetheless, based on their respective representations in pleadings and at hearing, it is apparent that certain facts are not disputed in this matter.[1]

1. In March 1986, the district evaluated [redacted], then a first grader, and found him eligible for special education services under the IDEA.

2. The District provided special educational services to [redacted] through the 1990-91 school year, when he was in sixth grade.

3. In 1991 [redacted] parents unilaterally placed him at a private school in New York, the Gow School. The child was educated at the Gow School through the 1996-97 school year. He graduated in May, 1997.

4. In the winter of 1994, [redacted] learned that [redacted] as a child with a learning disability, had special legal rights. He and his wife [redacted] saw a television program of "an interview with Peter Wright, a lawyer who had successfully established the rights of the parents of a girl with dyslexia to be reimbursed for the tuition for their child's education in the landmark case, *Florence County v. Shannon Carter.*" [Letter requesting due process hearing, dated September 16, 1994, of [redacted] and [redacted]]. Mr. [redacted] believed that Shannon's parents had unilaterally placed her in an independent school for the remediation of learning disabilities.

5. The [redacted] then telephoned Wright, who provided them with information on the rights of disabled students and their parents and the responsibilities of the public schools pertaining to them.

ADDITIONAL FACTS
FOR PURPOSE OF MOTION TO DISMISS

The child has alleged certain other facts which, for the purpose of the motion to dismiss, must be considered to be true:

6. At the time his parents enrolled [redacted] at the Gow School, the District sent copies of [redacted]'s transcript including grades, tests, individualized educational plans, psychoeducational evaluations and letters of recommendation (referrals) to the Gow School.

7. [redacted] was never given a copy of her legal rights under the IDEA or any explanation or discussion of her legal rights regarding the education of [redacted] by any school official at any time. The first time she was made aware that she had such possible rights as a parent was after learning about the same from a report on television in 1994.

8. [redacted] never received or was advised of his due process rights as a parent of a child in special education in any form at any time by anyone from the District from 1986 to present.

9. On October 9, 1991, Mr. [redacted] received a letter form Larry Maxey, Special Educational Director, Southwest Board of Cooperative Services, saying that Mr. [redacted] was responsible for paying [redacted]'s tuition. At this time, Mr. [redacted] believed Maxey's statement regarding his tuition responsibility because he had no knowledge otherwise. Maxey did not at any time advise Mr. [redacted] of his due process rights.

10. By letter dated May 16, 1994, Mr. [redacted] requested prospective and retroactive tuition for [redacted]s tuition. This request was based on Mr. [redacted]'s knowledge acquired by watching the television program about the *Carter* case. Before that time, the [redacted] had no idea they could be entitled to reimbursement for these expenses from the District.

11. In response to his request for reimbursement, the [redacted] received a letter dated October 3, 1994, from Kenneth DeLay, the District's attorney, advising them that their request for reimbursement was denied. This letter did not advise the [redacted] of their due process rights. [Mr. [redacted] affidavit] The letter further indicated that the district "stands ready to provide an appropriate program to [redacted] if [the [redacted] decide to have him return to the district."

12. By at least December 1995, the [redacted] consulted an attorney, who requested all District educational records regarding [redacted].

13. The record does not establish that the [redacted] knew of their right to a due process hearing under the IDEA, should the District deny their reimbursement request, at any time before September 16, 1996.

14. On September 16, 1996, the [redacted] requested a special education due process hearing pursuant to the IDEA. The [redacted] sought reimbursement for tuition and related expenses for [redacted]'s enrollment at the Gow School from the 1991-92 school year through the 1996-97 school year. At the time of the request, these expenses totaled approximately $105,000.

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DISCUSSION AND CONCLUSIONS OF LAW

I. Jurisdiction

The Administrative Law Judge has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*; Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.*, C.R.S. (1995 & 1996); and Part II, Section A, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1995-97. Neither party contests the jurisdiction of the Administrative Law Judge in this matter.

II. Standard Applicable to Motion to Dismiss

The parties are in agreement that because the IHO did not hold an evidentiary hearing, he was bound to consider the facts in the light most favorable to the child. *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3rd Cir. 1990). In this matter, the parties presented affidavits and attachments in an attempt to establish certain facts for the purposes of the District's motion to dismiss. When parties file conflicting affidavits in relation to a motion to dismiss, all factual disputes must be resolved in favor of the non-moving party. *Wenz v. Memery Crystal,* 55 F.3rd 1503 (10th Cir. 1995). The child contends on appeal that the IHO erred in dismissing the matter by failing to apply these standards.

The child also contends on appeal that the IHO's dismissal of his request for a due process violated his IDEA right to present evidence and confront witnesses. 20 USC § 1415(d)(2). The child does not appear to contend, however, that he would have a right to a hearing if the facts in this matter were uncontested or if the facts viewed in the light most favorable to him nonetheless establish no claim. The IDEA provides no right to an evidentiary hearing in these circumstances. It is thus appropriate to analyze the facts in this matter in light of the standard applicable to a motion to dismiss.

III. Analysis of IHO's Findings

Applying the above standards to the District's motion to dismiss and in light of the conflicting affidavits, the IHO erred making certain findings of fact in relation to the fifth issue considered, *i.e.*, whether the District violated the [redacted] right to procedural due process by failing to provide them with adequate notice of their legal rights as required by the IDEA. Specifically the IHO erred in making four findings of fact within Finding and Conclusion of Law No. 5, as set forth on page 5 of the Impartial Hearing Officer Ruling and as identified in that ruling by individual paragraphs preceded by an asterisk.[2]

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Asterisked Finding of Fact #1: The IHO concluded that the District provided the [redacted] adequate notice in 1986, when their child was initially evaluated. In so finding, the IHO relied on the Parent Consent - Assessment/Evaluation and/or Examination form, dated March 14, 1986, appended to the District's Supplemental Brief. This form permits parents to consent to their child's being evaluated. The attached form contains a signature purporting to be that of Mrs. [redacted] giving this consent and the signature of Gordon Gibson, purportedly a school official, below a statement that he had "reviewed the procedural safeguards as stated on the reverse side with the parent." The reverse side of the form contains language cited by the IHO stating that "parents are guaranteed the right to an impartial due process hearing if they disagree with the school district's proposal to initiate or change or refuse to initiate or change the identification, evaluation, educational placement or the provision of a free appropriate public education" and requiring a written request for hearing.

Mrs. [redacted] affidavit (attached to the Brief in Support of Petitioner's Response to the Respondent's Motion to Dismiss), however, represents that in connection with this form, she was only told that her consent to do further evaluations was needed. She states that there was never any discussion or explanation of parental rights, nor was she given a copy of the form. Taken in the light most favorable to the child, this affidavit must be considered to establish for the purposes of the motion to dismiss that Mrs. [redacted] did not receive notice of her procedural rights at this time.

Asterisked Finding of Fact #2: The IHO found that the [redacted] received notice of parental procedural rights during the course of the child's triennial review in 1989 when they received a booklet "Educational Rights Concerning Your Child and Special Education" (attached to Petitioner's Supplemental Brief). This booklet advises parents that they may submit a written request for a hearing. The IHO further concluded that a District representative verified that procedural safeguards were explained to the parent.

The IHO's finding appears to be based on a second parental consent to evaluation form dated May 15, 1984, which contains the signature of Gordon Gibson below a statement that he reviewed the procedural safeguards in the educational rights pamphlet with the parent.[3] The affidavit of [redacted], however, states that she was never given a copy of her legal rights or any explanation of them by any school official and that the first time she was aware of these possible rights was when she saw the television program referenced in Stipulated Finding of Fact #4 above. In addition, Mr. [redacted] affidavit (attached to the Brief in Support of Petitioner's Response to the Respondent's Motion to Dismiss) also states that he never received or was advised of his due process rights as the parent of a child in special education in any form at any time by anyone in the District from 1986 to June 9, 1997, the date of his affidavit. Taken in the light most favorable to the child, these affidavits must be considered to establish for the purposes of the motion to dismiss that neither Mr. or Mrs. [redacted] received notice of their procedural rights in 1989.

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Asterisked Finding of Fact #3: The IHO concluded that the District provided the above "Educational Rights Concerning Your Child and Special Education" pamphlet to the [redacted] during staffing reviews in the 1990-91 school year and that this provided them with adequate notice under the IDEA. The IHO based this finding on the affidavit of Sandy McLaughlin, who represents that she is a special education teacher who hosted several staffings for the child during the 1990-91 year. McLaughlin states that to the best of her knowledge and recollection, she followed her practice of giving parents a copy of the parental rights (in the form attached to affidavit) at staffings for the child. As referenced above, however, the affidavits of the [redacted] contain contrary assertions and for the purposes of the motion to dismiss, the IHO was bound to view these assertions in the light most favorable to the child and to resolve factual disputes against the District.

Asterisked Finding of Fact #4: The IHO found that the child did not overcome the presumption that the [redacted] did in fact receive written notice of parental rights on several occasions, which presumption arose from Mrs. [redacted] signature acknowledging such receipt. The basis for this finding is somewhat unclear. While Mrs. [redacted] did sign two parental consent to evaluation forms, it does not appear that she signed any statement indicating that she received written notice of parental rights. There is no evidence to establish that Gibson's signature indicating that he provided her written or oral notice of procedural rights was even on the forms before Mrs. [redacted] signed such that she could have adopted his affirmation.

In any case, the IHO erred in finding that the [redacted] failed to rebut any presumption applicable in this matter. Such a conclusion could only be reached after holding an evidentiary hearing. In resolving a motion to dismiss, the evidence must be viewed in the light most favorable to the [redacted].

Finding on Procedural Notice. Based on the record available to him, the IHO thus should have found that the [redacted] first became aware of their potential right to reimbursement from the District for costs at the Gow School in February, 1994, when they watched the television program regarding the *Carter* case. The IHO correctly found that the [redacted] had actual notice of their right to seek reimbursement by February 1994 (Asterisked Finding of Fact #5 on page 5) but also found that this was not their first notice of this right. The IHO determined that adequate notice can be provided by third parties. *Gregory M. v. State Board of Education*, 891 F.Supp. 695, 701 (D. Conn. 1995), *Robertson County School System v. King*, 24 IDELR 1036, 1039 (6th Cir. 1996); *Phillips v. Board of Education*, 949 F. Supp. 1108, 1113 (S.D.N.Y. 1997).

Based on the [redacted] own affidavits and request for a due process hearing, it is clear that as of February, 1994, [4/] they knew they had a potential right to reimbursement from the District of their child's educational costs at the Gow School. Viewed in the light most favorable to the [redacted] however, the [redacted] did not know at

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this time that they had a right to a due process hearing should the District deny their reimbursement request. The mere fact that the [redacted] requested reimbursement does not imply knowledge of a right to a due process hearing and the affidavits of the [redacted] do not support such a finding. While it is clear that the [redacted] had such notice by the time they requested a due process hearing in September 1996, the record before the IHO does not establish when they acquired such knowledge. The IHO thus erred in concluding that no procedural violations occurred in this case. (Finding and Conclusion of Law No. 6, page 6).

The District further contends that [redacted] received adequate notice under the IDEA because they were provided "meaningful involvement with the educational placement of their child." *Gregory M. v. State Board of Education, supra*. The District contends that the circumstances addressed in that case are analogous to those present here. The IHO did not address this contention and would not have been able in any case to determine whether the [redacted] were provided with "meaningful involvement with the educational placement of their child" without holding an evidentiary hearing. The Administrative Law Judge thus cannot conclude on appeal that the [redacted] had adequate notice under the IDEA based on meaningful involvement. Further, the District appears to contend that the [redacted] received advice regarding their right to a due process hearing from various attorneys, including William Baseman, who represented the [redacted] as of December, 1995. The record on the motion to dismiss is simply insufficient to support any such finding.

IV. Tolling of Statute of Limitations

The [redacted] contend that the issue of when they received notice of their procedural rights is significant because the failure to provide this notice tolled the statute of limitations. The [redacted] appeal the IHO's determination that the cause of action in this matter accrued in the fall of 1991 or at the latest on May 16, 1994. They do not, however, contest the IHO's determination that Colorado's two-year statute of limitations in Section 13-80-102(1)(g), C.R.S. applies to their request for a due process hearing made on September 16, 1996. While it is unclear when the [redacted] believe a cause of action accrued for statute of limitations purposes, they contend that the lack of notice tolled the running of the statute of limitations such that their claim for reimbursement is not barred.

The parties do not dispute and the Administrative Law Judge concurs with the IHO's conclusion that federal law controls the issue of when a cause of action under the IDEA accrues. *Hall v. Knott County Board of Education*, 941 F.2d 402, 408 (6th. Cir. 1991), *cert. denied* 112 S. Ct 982 (1992). Likewise, there is no dispute that under federal law, the applicable standard is that a cause of action accrues when the plaintiff knows or has reason to know of the injury giving rise to a cause of action. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992); *Oak Park School District v. Illinois State Board of Education*, 886 F. Supp. 1417 (N.D. Ill. 1995); and *Hall v. Knott County Board of Education, supra*. No mechanical formula exists for determining when a cause of action accrues, and the court must keep in mind the purpose of the act and the practical ends served by the statute of limitations. *Murphy v. Timberlane Regional School District,* 22 F.3d 1186 (1st Cir. 1994).

A number of decisions applying statutes of limitations in IDEA cases have tolled the statute of limitations for equitable reasons. *Timberlane Regional School District v. James V.,* 18 IDELR 960 (D.N.H. 1992) [receipt of hearing decision triggering statute of limitations 32 days after mailed]. *Bow School District v. Quentin W.,* 750 F. Supp. 546, 551 (D.N.H. 1990); *Morris v. Red Clay Consolidated School District Board of Education,* 998 F.2d 1004 (3rd Cir. 1993) [defective notice of right to judicial review]; *I.D. v. Westmoreland School District,* 788 F. Supp. 634 (D.N.H. 1991) [parental attempts to untangle a confusion of relevant statutory and administrative provisions without counsel]; and *Zipperer v. School Board of Seminole County,* 891 F. Supp 583 (M.D. Fla. 1995)[equitable tolling can resolve special difficulties faced by individual litigants].

When the state statute of limitations is borrowed in relation to a federal right, the state principles for tolling that statute of limitations are also applied. *Timberlane Regional School District v. James V.,* 18 IDELR 960 (D.N.H. 1992). *Gerasimou v. Ambach,* 636 F. Supp. 1504 (E.D.N.Y. 1986); *see Board of Regents v. Tomanio,* 446 U.S. 478, 483-86 (1980) [borrowing both state's tolling rules and its statute of limitations in 42 U.S.C. § 1983 action].

In Colorado a statute of limitations is subject to equitable tolling in various factual circumstances when fairness requires it. *Garrett v. Arrowhead Improvement Association,* 826 P.2d 850 (Colo. 1992). In *Strader v. Beneficial Fiance Co,* 191 Colo. 206, 551 P.2d 720 (1976), for example, the finance company's failure to provide information it was under a statutory duty to provide (*i.e.,* the annual interest rate on a loan) provided an equitable basis for tolling the statute of limitations. The court found that allowing the finance company to benefit from its own wrongdoing in failing to make a statutory disclosure would be highly inequitable. The application of the equitable tolling doctrine, however, requires an inquiry into the particular factual circumstances of the case. *Garrett v. Arrowhead Improvement Association, supra* at 855.

The type of factual determinations necessary to resolve [redacted] claim of equitable tolling of the statute of limitations cannot be made without holding an evidentiary hearing. The IHO concluded that the statute of limitations had not been tolled because no procedural violations occurred. The IHO must now hold an evidentiary hearing to determine both when the [redacted] actually received notice of their right to a due process hearing and whether an equitable tolling of the statute of limitations is warranted.

V. Application of Statute of Limitations to Bar Prospective Reimbursement

[redacted] also contends that the statute of limitations cannot in any case bar his claim for prospective reimbursement for the 1996-97 school year. The [redacted] requested a due process hearing on September 16, 1996, to seek reimbursement of both prospective and retrospective costs associated with the child's placement at the Gow School.

The District contends that the IHO properly applied the statute of limitations to bar the child's entire claim for reimbursement. The District contends that the case at hand is factually similar to certain cases in which the entire claim for reimbursement was found untimely. *Janzen v. Knox County Board of Education*, 790 F.2d 484 (6th Cir. 1986); *Richards v. Fairfax County Board of Education*, 21 IDELR 845 (4th Cir. 1993); and *Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education*, 79 F.3d 654 (7th Cir. 1996).

None of these cases relied on by the District, however, involves a claim for reimbursement for current expenses incurred in placing a child in a private school. In *Janzen v. Knox County Board of Education*, the parents filed a federal court action in 1985 seeking reimbursement for the costs of a unilateral placement in a private school in 1978 to 1981. In *Richards v. Fairfax County Board of Education*, the parents filed a federal court action alleging that the school district had terminated special education services in violation of the child's right to two more years of a free appropriate public education. This action was filed three years after the school district issued the child a high school diploma and informed him that he would provide no more special education services. In *Board of Education of Oak Park & River Forest High School District 200 v. Illinois State Board of Education*, the parents requested a due process hearing challenging the special education services provided by the school district to their son in the previous school years. This case did not involve a claim for reimbursement. These cases are so factually dissimilar to the one at hand that they provide no persuasive support for the District's proposition that the statute of limitations bars a claim for prospective relief.

The District appears to argue that a single cause of action arose when the [redacted] unilaterally placed [redacted] at the Gow School in 1991 and that the statute of limitations bars all reimbursement claims which may be made in subsequent school years. The September 16, 1996 request for a due process hearing contains a request for reimbursement for the 1996-97 school year. Although the statute of limitations may bar claims for reimbursement in prior years, it does not appear to bar a request made at the beginning of a school year for reimbursement of private school costs for that year. *See Bow School District v. Quentin W., supra* at 551 (placement decisions occur at least annually and each triggers a new statute of limitations).

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At least one court has recognized the right to reimbursement for a unilateral placement for the year in which the request for a due process hearing was made. *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3rd Cir. 1994).[5] While the court denied the parents' request for reimbursement for the two academic years prior to the one in which the request for a due process hearing was made, it awarded reimbursement for the year in which the due process hearing request was made based on a close scrutiny of the equities. In the context of ruling on a motion to dismiss, the IHO was not able to conduct such a close scrutiny of the equities.[6] Even if the statute of limitations bars the [redacted] request for reimbursement of past expenses, the IHO must conduct an evidentiary hearing to consider [redacted] claim for reimbursement for the 1996-97 school year.

VI. When the Statute of Limitations Begins to Run

On appeal the child also contends that the statute of limitations begins to run on October 3, 1994 (the date of DeLay's letter advising the [redacted] that their request for reimbursement was denied) and not May 16, 1994 (the date they requested reimbursement). The child cites no support for this position, and the position itself is unclear. It appears that the child contends that a cause of action can only arise on a reimbursement claim once the child is fully aware of his right to reimbursement from the District, his right to a due process claim, his request for reimbursement, and the District denial of that claim. Since an evidentiary hearing on the issue of when the child received notice of his due process rights may obviate the need to consider this contention and the Administrative Law Judge is unsure of the child's position in any case, the Administrative Law Judge does not address this matter on appeal.

INITIAL DECISION

It is the decision of the Administrative Law Judge upon state level review that the IHO's dismissal of this matter is set aside. This matter is remanded to the IHO for timely proceedings consistent with this decision, including an evidentiary hearing to determine the matters outlined above.

DONE AND SIGNED

September 15, 1997

Nancy Connick
NANCY CONNICK
Administrative Law Judge

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FOOTNOTES

1/ Both the District and the child have asserted numerous other facts in their briefs. The record does not establish, however, that these facts are undisputed.

2/ There are five unnumbered findings reflected on this page. Each is designated by as asterisk. For purpose of this decision, the Administrative Law Judge has designated the first asterisked paragraph as Asterisked Finding of Fact #1, the second asterisked paragraph as Asterisked Finding of Fact #2, and so on.

3/ Since the date of this form does not coincide with the date of the IHO's finding, it is possible that the IHO relied on other assertions in the record. In any case, because the [redacted] deny receipt of written notice of their rights, the exact source of the IHO's ruling does not alter the resulting conflict in the record.

4/ Although Mr. [redacted] affidavit refers only to his viewing of the television program in the winter of 1994, the IHO found that the [redacted] viewed this television program in February, 1994, and Petitioners' counsel has also used this same date in his oral argument. The Administrative Law Judge thus believes that the record for purposes of the motion to dismiss establishes that the [redacted] viewed this program in February, 1994.

5/ In *Houston Independent School District*, 21 IDELR 208 (SEA TX 1994), certain claims for reimbursement for a unilateral private residential placement were barred based on the applicable two-year statute of limitations. The claim for reimbursement for two years preceding the request were deemed timely, although ultimately barred on other grounds.

6/ The District argues that the circumstances addressed in *Bernardsville Board of Education v. J.H.* are distinguishable from those presented in the instant case. It further cites several equitable considerations in support of its contention that no reimbursement for the 1996-97 school year is appropriate. The District echoes the language in *Houston Independent School District*, 21 IDELR 208, 211 (SEA TX 1994) that students cannot save up a lifetime of educational grievances which then impose burdensome expenses on the school district. That decision emphasizes that a student has access to the hearing process every year and that if he chooses not to use it, it is impossible to determine whether the expenditures for which reimbursement is later sought were necessary or whether a prompt complaint might have obviated their need. *In accord Garland Independent School District v. Wilks*, 657 F. Supp. 1163, 1168 (N.D.Tex. 1987). The District also asserts that the [redacted] request for delays in holding a due process hearing, which resulted in the IHO's ruling after the school year was over, precluded it from evaluating [redacted] and determining an Individualized Education Program to meet his needs. None of

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these assertions based on equitable considerations, however, can be considered without a full evidentiary hearing.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW REMANDING TO IMPARTIAL HEARING OFFICER** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to: Jason Searns, Esq., Jason Searns & Associates, 50 South Steele Street, Penthouse Suite 1050, Denver, CO 80209; Kenneth A. DeLay, Esq., Miller, DeLay & Crabb, P.C., 2008A West 120th Avenue, Westminster, CO 80234; and Alan R. Johnson, 325 Second Street, P.O. Box 723, Monument, CO 80132; and via Interoffice Mail to: Myron Swize, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203, on September 15, 1997.

Cathy Stope
Secretary to Administrative Law Judge

ed9705st.dec

Case Number: 96. 501

Status: Complaint Decision

Key Topics:

- Extended School Year
- Free Appropriate Public Education
- Related Services

Issues:

- ESY for students on track school year
- Transportation as a related service for all preschool children

Decision:

- District violated Act by failing to appropriately consider eligibility for ESY services and eligibility for transportation as a related service as part of the IEP process for preschool children

Discussion:

- The appropriate standard for transportation as a related service is whether it is needed due to the unique needs created by the child's disability. Just being of preschool age is not a qualifier

FEDERAL COMPLAINT NUMBER 96.501

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on January 9, 1996.

B. The complaint was filed by Mr. William Baesman, attorney at law, representing Ms. B.G. on behalf of her daughter, T.G., and Mr. and Mrs. M.M. (D.M.) on behalf of their son, P.M., against the Douglas County Schools, Dr. Richard O'Connell, Superintendent and Mr. John Doherty, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires on March 11, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0..

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G T.G. and P.M. are students with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, an onsite record review and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District violated the provisions of the Act, by:

- failing to provide T.G. and P.M. a FAPE specifically by:
  - not considering extended school year ("ESY") services and
  - not considering eligibility for transportation as a related service and

- having district policies which prevent the consideration of:
  - ESY services for students with disabilities during track school years and
  - transportation as a related service for children with disabilities ages three to five who attend, or have attended, the District's preschool programs since 1991.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. IEP teams must determine and document the projected dates for initiation of services and the anticipated duration of services, including consideration of eligibility for services beyond the regular school year (ESY). Such determination should be based upon a finding that the child in question has or will have difficulty maintaining the level of all skills or some specific skills learned during the regular school year without the provision of ESY services. This occurs when (1) a child suffers an inordinate or disproportionate degree of regression during that portion of the calendar year in which the 180-day school year is not in session, and (2) it takes an inordinate or unacceptable length of time for the child to recoup those skills that have been lost. Accordingly, the child requires more than the 180 day school year to maintain skills previously learned. IEP teams must apply not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents, in determining a student's eligibility for ESY services.

5. Transportation may be provided as a related service if it is required to assist a child with a disability to benefit from special education. For transportation to be considered a related service, the need for transportation must be specifically related to the unique needs created by the child's disability. The Act requires a relationship between the related service (in this case, transportation) and the unique needs of the child. Examples of some of the unique needs that may indicate a requirement of transportation as a related service and that have been recognized by the courts are:
   -lack of mobility
   -visual impairment
   -school location (student's disability made it difficult for her to walk on even, slippery, or inclined surfaces--conditions which were likely to be present when she walked to her assigned bus stop during the winter months)

6. T.G. and P.M. are students with disabilities eligible for services from the District under the Act. T.G.'s initial placement was on 4/15/94 and P.M.'s initial placement was on 5/4/94. An annual review for T.G. was held on 10/6/95 and 11/3/95 and a copy of the individualized education program ("IEP") which was developed as a result of that review meeting was provided to the complaint investigator by the district. An annual review for P.M. was held on 9/22/95, 11/21/95 and 11/29/95; and a copy of the IEP which was developed as a result of that review meeting was provided to the complaint investigator by the district. Copies of initial IEPs and any subsequent IEPs until the fall of 1995 were not provided by either the complainants or the District.

Re: failing to provide T.G. and P.M. a FAPE specifically by not considering ESY services

7. The complainants state that T.G. and P.M. were initially provided special education and related services beginning August, 1994, which was the beginning of the 1994-95 track school year (as distinguished from an "academic school year"). The complainants allege that never during any IEP meetings for T.G. and P.M. were ESY services mentioned, discussed or considered. After learning about the possibility of ESY services from private service providers and subsequent counsel, the complainants/parents requested consideration for ESY services as each was paying for private services during periods of school break.

    a. B.G.'s request was via a letter dated 12/11/95. The complainants allege the District has failed to formally respond to this request.

    b. The complainants allege that Mr. and Mrs. M.M. requested ESY services at the 11/21/95 IEP meeting but that the District refused to discuss the issue to finality. The complainants further allege that the District determined that ESY services were not needed, and that this decision was made without the input or participation of Mr. and Mrs. M.M. and that the decision was not made at an IEP meeting.

8. The District, in its response to the complaint, states:

    a. ESY eligibility was discussed as part of the IEP development for both T.G. and P.M. and parents were in agreement prior to 12/95 that there was no need for ESY services.

    b. At the 12/95 reviews for each of these children, the IEP teams indicated that a very minimal level of service was appropriate, and the results were recorded as part of the IEPs.

9. Documentation provided by the District indicates the following:

    Regarding T.G.:

    a. No documentation of the 4/15/94 IEP or any subsequent IEPs during the 1994-95 school year were provided. The IEP dated 10/6/95 and 11/3/95 does not indicate ESY was considered.

    b. A letter from B.G. to G.W., child find coordinator, and J.D., director of special education, dated 12/11/95, requests consideration of ESY services for T.G. B.G.

states that T.G.'s needs require ESY during all school breaks including, but not limited to, fall, Christmas, Spring and summer.

c. G.W. responded to B.G. on 12/13/95, indicating that these issues can be addressed through the IEP (staffing) process and that she would like to meet with B.G. to address ESY at a convenient time. B.G. was asked to suggest a time.

d. B.G. responded to G.W. on 12/15/95, restating that the outstanding issue of ESY must still be addressed. No meeting time was suggested.

e. A meeting held on 12/19/95 with B.G. and five District staff members to review T.G.'s need for ESY services. The team did not agree to ESY services for the upcoming winter break, but agreed to develop suggestions for home activities to be implemented by the family during winter and spring break and agreed to meet during the first week of April, 1996, to address ESY plans for summer break.

Regarding P.M.:

a. No documentation of the 5/4/94 IEP or any subsequent IEPs during the 1994-95 school year were provided. The IEP dated 10/6/95 and 11/3/95 does not indicate ESY was considered.

b. A letter from G.W., the District's child find coordinator, to D.M. dated 11/29/95 indicates that District staff will be meeting in the next few days and will attempt to come up with an ESY plan, as they are all in agreement that this issue needs to be addressed prior to the Christmas break. The letter also indicates that the District is seeking legal counsel regarding ESY and will keep D.M. informed.

c. A letter from G.W. to D.M. dated 12/14/95, indicates District members of the staffing team met on 12/4 and 7/95 to review P.M.'s need for ESY services. The team determined that ESY services were not necessary during the Christmas break, but that home activities would be prepared to reinforce carry-over in one area and that staff would be contacted to explore the possibility of providing one session per week of activity. The team also indicated that although P.M.'s performance remains generally consistent over breaks of shorter duration, the staff had more questions regarding his ability to maintain over longer breaks periods such as the summer break and would like to reconvene in the spring to review an ESY plan for summer.

10. Although the District indicates that ESY was discussed as part of the initial IEPs for T.G. and P.M., it provided no documentation of this nor of any IEPs generated during the 1994-95 school year. A team, including B.G. did meet in the fall of 1995 to discuss ESY services for T.G. and the results of that meeting were documented, but not on an IEP. A District team which did not include Mr. or Mrs. M.M., did meet in the fall of 1995 to discuss ESY services for P.M. and the results of that meeting were documented, but not on an IEP. There is no documentation that Mr. or Mrs. M.M. were provided notice of that meeting. The District and the complainants differ on their perceptions as to whether or not these were IEP meetings with proper notice, recording of information and procedural safeguards. No documentation was provided to support the concept of formal IEP meetings.

11. The District did not appropriately address eligibility for services beyond the regular school year for T.G. and P.M. This must be done as part of the IEP process and must be documented on the IEPs.

Re: having a district policy which prevents the consideration of ESY services for preschool students with disabilities during track school years

12. The complainants allege that the District has failed to consider eligibility for services beyond the regular school year for all children with disabilities age three to five who attend, or have attended the District's Preschool Programs district wide since 1991.

13. The District, in its response to the complaint, states that ESY needs for all students with disabilities, including preschool students, have been considered regardless of school calendar year. In the case of a year-round school, regression and recoupment problems during the various breaks are analyzed, and where appropriate, ESY services are provided during the breaks. It states that ESY has always been considered, with parental input, as part of the IEP review process for preschool students. Documentation of IEP ESY needs was not noted on the individual preschool children's IEPs however until the fall of 1995. The District states that ESY has been considered as part of the IEP review process since 1992 and that administrative documentation exists regarding the names of preschool children identified to receive ESY services.

14. An onsite review of randomly selected records of IEPs for 48 students, ages three through five, placed into Preschool Programs from 1991 until the present, indicated the following:

    a. Documentation of the consideration of ESY services was found on 6 IEPs.

    b. 4 of those 6 were provided ESY services. The reasons for providing ESY services included: "separation extremely difficult", "regression noted in social interaction level", "California IEP indicates need", and "overwhelmed in group settings".

    c. 2 were determined not to need ESY services for the following reasons: "Track C starts 7/94-takes gymnastics, etc.", "attends year round school-no history of regression".

    d. ESY services were provided to 6 other preschool students, however there was no documentation on the IEPs or attached to the IEPs to justify these services.

15. The District did not appropriately address eligibility for services beyond the regular school year for preschool students. The District's written policy and guidelines for consideration of ESY eligibility are appropriate, but its practice and non-written policy related to preschool students is not. Decisions must be made as part of the IEP process for all students with disabilities and must be documented on the IEPs.

Re: failing to provide T.G. and P.M. a FAPE specifically by not considering eligibility for transportation as a related service

16. The complainants allege that never during any IEP meetings for T.G. and P.M., from the date of the initial IEP to the date this complaint was filed, was transportation as a related service mentioned, discussed or considered. After learning about the possibility of transportation as a related service through legal counsel, the complainants/parents requested consideration for transportation services as each was providing transportation at their own expense.

    The complainants allege that T.G. and P.M., both four year olds, have significant communication and behavioral deficits and, as a result of their level of functioning, cannot independently travel to and from or access their preschool program and, therefore, should be provided with transportation as a related service.

17. The District, in its response to the complaint, states that T.G. and P.M. came through the Child Find System with no transportation issues related to their disabilities. B.G. requested transportation in December, 1995, due to the possibility of her seeking employment and being unable to transport T.G. Mr. and Mrs. M.M. requested transportation in the fall of 1995 without indicating any particular parent or child needs other than those related to his age.

18. Documentation provided by the District indicates the following:

    T.G.'s IEP dated 10/6/95 and 11/3/95 indicates special transportation is not needed. P.M.'s IEP dated 9/22/95, 11/21-29/95 indicates special transportation is not needed. No previous IEPs were provided for documentation.

19. Although T.G.'s and P.M.'s IEPs indicate transportation is not needed as a related service, this decision, by the District's own admission, was made during the Child Find process and not during the IEP meetings (see Finding # 22,b, below).

20. The District did not appropriately address eligibility for transportation as a related service for T.G. and P.M. This must be done as part of the IEP process and must be documented on the IEPs.

Re: having a district policy which prevents the consideration of transportation as a related service for children with disabilities age three to five who attend, or have attended, the District's preschool programs since 1991

21. The complainants allege that the District has failed to provide transportation services to all children with disabilities age three to five who attend, or have attended the District's Preschool Programs district-wide since 1991. They allege that the District's practice and policy is not to provide transportation to and from its Preschool Programs to children with disabilities ages three to five unless they have a severe physical disability. They also allege that most, if not all, children with disabilities, ages three to five, can not, due to age and disability, travel to or from school independently and therefore, can not access school or special education services. Parents must then provide transportation at their cost, so that their children can benefit from special education.

22. The District, in its response to the complaint, states the following:

    a. The District does not provide transportation to preschool students who are not disabled.

    b. Parent/family needs are assessed during the Child Find process, and this includes the need for transportation as a related service. This information is then carried forward to the IEP.

    c. The complainants' allegation that transportation is only provided for children with severe disabilities is not accurate. Children whose disability results in a requirement for specialized transportation, or who are placed outside of their home school to meet IEP needs, are provided transportation as a related service.

d. For those students who do not need transportation as a related service, but who may need transportation to access the preschool program due to the parents' inability to transport, transportation is discussed through a problem-solving process. This may include a discussion about car pools, day care, neighbors, and consideration of a variety of options. If no other option is available, the District has been historically providing transportation in these cases.

e. The District follows the standard written in the "Colorado Quality Standards for Early Childhood Care and Education Services, A Planning Document", November 1994, E-9b". This document was prepared as general guidelines for the provision of services to all children birth to 8 years of age. It states:

When determining whether transportation is provided for an individual child, the program considers the following:
- proximity of the program and services to the child's home,
- means by which other children in the program get to and from the program and services,
- ability of the family to transport the child, including the benefit of regular and on-going communication between family and staff that occurs when families transport their own children,
- possibilities for walking, carpooling, or other typical alternatives,
- special transportation for non ambulatory children and
- the eligibility requirements of special transportation services

23. An onsite review of randomly selected records of IEPs for 48 students, ages three through five, placed into Preschool Programs from 1991 until the present, indicated the following:

a. Transportation was considered, according to documentation, for 46 of the 48 students.

b. The need for transportation was checked "No" for 42 of these 46 students.

c. The need for transportation was checked "Yes" for 4 of these 46 students with the additional information, "door to door" and/or "seat belt".

24. The District does not appropriately address eligibility for transportation as a related service for preschool students, as decisions are not made as part of the IEP process, but rather as part of the Child Find assessment process. The District's policy regarding transportation as a related service for preschool students with disabilities is not clear. Decisions must be made by the IEP team which considers the needs of the child, not the needs or convenience of the parents/family. The appropriate standard for transportation as a related service is whether it is needed due to the unique needs created by the child's disability. Should the District wish to go beyond this standard and utilize its or Colorado's guidelines for considering the provision of transportation in general to participants in early childhood programs, it may do so. But that provision of transportation must be clearly distinguished from the determination that transportation is needed as a related service preschool students with disabilities.

III. CONCLUSIONS

1. The District did violate the provisions of the Act by failing to appropriately consider eligibility for ESY services and eligibility for transportation as a related service for T.G. and P.M., as part of the IEP process.

2. The District's practices regarding the determination of eligibility for ESY services for preschool children with disabilities do violate the provisions of the Act, as the determinations are not done as part of the IEP process.

3. The District's policies and practices regarding the determination of eligibility for transportation as a related service for preschool children with disabilities do violate the provisions of the Act, as the determinations are not done as part of the IEP process.

IV. REMEDIAL ACTIONS

1. The District must immediately initiate the practice of considering a student's eligibility for ESY services at all IEP meetings and document such decisions on IEPs. Until the time when new forms are adopted to allow for this documentation, such information must be added to the IEPs.

2. On or before April 1, 1996, the District must develop a written policy regarding the provision of transportation as a related service to preschool students and clarify any differences between this and its policy to provide transportation based on parent/family need as determined as part of the general early childhood child find assessment process. Such policy must include provisions for the determination of eligibility to be a part of the IEP process.

3. On or before April 15, 1996, the District must provide a written memo to staff explaining the above practice and policy.

4. On or before April 5, 1996, the District must provide to this office a copy of the proposed transportation policy and draft memo to staff, for approval. Such approval will be provided within 5 days of receipt.

5. On or before May 1, 1996, a review of the IEPs for T.G. and P.M. must be held to specifically consider eligibility for ESY services and eligibility for transportation as a related service.

6. Beginning May 1, 1996, the District must consider eligibility for transportation as a related service for all preschool students at their regularly scheduled annual reviews and/or initial IEP meetings.

7. On or before November 1, 1996, CDE will monitor the above (# 1 and #6) by reviewing a random sample of case files.

Dated this _____ day of March, 1996

____
Carol Amon, Federal Complaints Investigator

____
Cheryl Karstaedt, Legal Affairs Coordinator

Case Number: 96.502_

Status: Complaint Decision

Key Topics: Free Appropriate Public Education
School of Choice

Issues:
- Was FAPE denied as a result of child's enrollment in school of choice

Decision:
- District did not violate Act

Discussion:
- FAPE was offered both in his home school and a neighboring school to his school of choice, but both were rejected by the parent.

FEDERAL COMPLAINT NUMBER 96.502

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on January 22, 1996.

B. The complaint was filed by Ms. A.L. on behalf of her son, A.L., against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, District Manager of Special Education ("the District"), against the Expeditionary Board of Cooperative Educational Services ("the BOCES") and the Rocky Mountain School of Expeditionary Learning ("RMSEL").

C. The timeline within which to investigate and resolve this matter expires on March 22, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. RMSEL is a public school of choice offered cooperatively by Cherry Creek, Denver, Douglas County, and Littleton public school districts through the creation of the BOCES. It is physically located within the Denver attendance boundaries.

F. The sponsoring districts established the BOCES to oversee the administration of RMSEL. The school districts of residence, for each child attending RMSEL, pay to the BOCES all state per pupil operating revenues and any other state and federal funds that are paid to the sponsoring district to serve a pupil attending RMSEL.

G. The BOCES, in its intergovernmental agreement, agreed to comply with all applicable state and federal laws, including the constitutional provisions prohibiting discrimination on the basis of disability. It also agreed to not screen applications for enrollment based on a student's special learning needs.

H. The complaint was brought against the District, directly, and the BOCES, indirectly, as recipients of federal funds under the Act. It is undisputed that they are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. A.L. is a student with disabilities residing within the District's attendance boundaries and attending school at RMSEL and was determined to be eligible for services from the District under the Act.

J. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over some of the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

K. The investigation of the complaint included a review of the documents submitted by the parties, interviews with persons named in those documents or who had information relevant to the complaint, and consideration of relevant case law and federal agency opinion letters.

II. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District, BOCES and/or RMSEL have violated the provisions of the Act, by failing to provide to A.L. special education services in the area of learning disabilities, through resource/itinerant delivery, 65 minutes per day, 5 days per week, beginning on 10/27/95 to the present, pursuant to his IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346 and 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding and, pursuant to contract, those funds are to be transferred to the BOCES where applicable.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. Once a student has been determined to be eligible for special education and related services, an IEP must be developed which includes statements of specific special education and related services to be provided, recommendations as to where the services will be provided, rationale for providing services outside of the regular classroom if accomplishment of IEP goals and objectives cannot be achieved satisfactorily there, and documentation of options considered. The District's Director of Special Education must then place the child in the least restrictive environment consistent with the recommendations of the IEP.

5. Through the Child Find Process, A.L. has been identified by the District as a student with learning disabilities on an initial IEP dated 10/27/95. The IEP states that, beginning 10/27/95, LD Resource/Itinerant special education services will be provided 65 minutes per day 5 days per week. A.L. was attending RMSEL at the time this IEP was developed. There is no recommendation on the IEP as to where these services are to be provided.

6. The complainant alleges that the implementation of the IEP has not begun nor have needs been addressed. She states that the District offered to send A.L. back to his home school in order to receive special education services and that it also offered to provide those services at Hamilton Middle School, the closest District building to RMSEL, should the parents agree to transport him there for daily services. The complainant wishes to maintain A.L.'s enrollment in RMSEL and is not able to provide such transportation and, therefore, is requesting that the IEP be implemented at RMSEL.

7. The District, in it response to the complaint, states the following:

   a. Ms. A.L. was told at the initial IEP meeting that the special education services identified on the IEP were not available at RMSEL.

   b. Ms. A.L. was subsequently told by the District's Director of Special Education that A.L. could receive the appropriate special education services at his home school, Henry Middle School.

   c. Upon learning that Ms. A.L. wanted A.L. to remain in RMSEL, the Director of Special Education offered the daily special education services at Hamilton Middle School, another District school close to RMSEL. This option would require the parent to provide transportation because appropriate services were still available at A.L.'s home school. Ms.. A.L. refused that option.

   d. Currently, A.L. is receiving two hours per week of special education services from the RMSEL special education staff.

   e. RMSEL's staff informed Ms. A.L. in November that the school's services were limited. They shared with her the policy stance that the four district special education directors had taken regarding the offering of special education services to RMSEL students. That policy was to not offer the full range of services at RMSEL that could be recommended on IEPs, because RMSEL was a BOCES operated school of choice and students would be able to receive full services in their home districts.

   f. The District believes it has not violated the Act, as it has offered a FAPE at A.L.'s home school or at another school close to RMSEL.

8. The BOCES, which was formed solely for the purpose of establishing and governing RMSEL, is not considred a special education administrative unit as defined in Colorado's Rules for the Administration of the Exceptional Children's Educational Act.

9. A document published by the BOCES states the following under "Facts" about RMSEL: "4. Whom will it serve?.....Committed to serving a "typical" public school population in all of its diversity, the school will provide for the exceptional needs of all its students".

10. The four district special education directors' policy to "not offer the full range of services at RMSEL recommended on IEPs" appears to be in conflict with the published fact that RMSEL "will provide for the exceptional needs of all its students". It appears that the BOCES operated school of choice (RMSEL) will only serve students with disabilities whose service provision is two hours per week or less.

11. According to statutes governing public schools of choice in Colorado, no school district shall be required to establish and offer any particular program in a school of choice if such program is not currently offered in that school.

12. After determining A.L. to be eligible for special education and related services, the District developed an IEP. Although the IEP does not recommend a placement, pursuant to state rules, the District Director of Special Education offered to the parent/ complainant two different placements in the least restrictive environment, one in the home school and the other near the school of choice. Both were rejected by the complainant. According to State statutes, the school of choice is not required to offer a special education program it does not have.

III. CONCLUSIONS

1. The District did not violate the provisions of the Act by failing to provide to A.L. special education services in the area of learning disabilities, through resource/ itinerant delivery, 65 minutes per day, 5 days per week, beginning on 10/27/95 to the present, pursuant to his IEP. A free appropriate public education was offered to A.L. by the District at both his home school and a neighboring school to his school of choice, and both were rejected by the parent/complainant.

2. The BOCES' policy of not providing more than two hours per week of special education services is in direct conflict with its advertised policy to provide for the exceptional needs of all its students. Such policy also is in conflict with its agreement to not screen applications for enrollment based on a student's special learning needs. While this may be a discrimination issue and/or an issue relative to the contractual agreement between parents and the BOCES governed by State law, this office is not in a position to enforce such agreements. These Findings and Conclusions pertain only to the Act and not to state contractual law or Section 504 of the Rehabilitation Act of 1973.

IV. RECOMMENDATIONS

It is strongly recommended that the BOCES clarify its policy relative to serving students with disabilities. Such policy should state that RMSEL will only provide special education services to those students whose IEPs indicate the limited services provided at RMSEL are appropriate rather than implying it will provide for the exceptional needs of all its students. Such policy should also address the fact that although the BOCES agrees to not screen applications for enrollment based on a student's special learning needs, it will not provide services to meet all learning needs. This should be clarified in all documents regarding the admission of students to RMSEL.

Dated this _____ day of March, 1996

____
Carol Amon, Federal Complaints Investigator

Case Number: 96. 504

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Modifications

Issues:

- Provision of special education services, vocational services and 13 modifications during first 3 weeks of school

Decision:

- District admitted they did not provide all, beginning the first day.

Discussion:

- Technically, this is a violation, but did not constitute a failure to provide FAPE

FEDERAL COMPLAINT NUMBER 96.504

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was written on January 29, 1996 and received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on February 1, 1996.

B. The complaint was filed by Ms. P.B. on behalf of her daughter, R.B., against the Denver Public Schools, Mr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education("the District").

C. The timeline within which to investigate and resolve this matter originally expired on April 1, 1996, but was extended to April 8, 1996, at the request of the complainant, in order to allow her to gather documentation relative to the differences between her allegations and the District's response.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G R.B. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; an onsite interview with the principal, case coordinator, counselor and two special education teachers; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District violated the provisions of the Act by failing to provide to R.B. the following special education services, modifications and adaptations as listed on her current IEP (5/24/95) during the time she has been enrolled in Lincoln H.S.:

- special education services:
  -LD Resource Room with a special education teacher, 90 minutes per day, 5 days per week,
  -LD ISIS services with a special education teacher, 90 minutes per day, 5 days per week,
  -S/L Itinerant services with a speech/language specialist, 30 minutes per day, 2 days per week,
  -Consult to regular education

- vocational services:
  -participation in community experiences such as supermarket, library, recreation program, etc., 1 X per week for 2 hours total,
  -opportunity for 2 job shadowing experiences,
  -one work experience during the year in the school or community for 1-2 hours, 2 days a week,
  -opportunity to explore vocational interests

- modifications (characteristics of service)
  -seating near front of room due to fluctuating hearing
  -role playing and opportunities to problem solve
  -redirection to activity/task
  -small group instruction and one to one instruction
  -transportation to/from school
  -school or community based work program
  -varied community experiences
  -RTD transportation as appropriate
  -career and academic counseling
  -modified curriculum and shortened assignments
  -use of calculator, computer, printer
  -key locks for book, gym and electives lockers
  - use of taped materials and cooperative assignments with peers so that she can access to grade level materials which may be too challenging academically for to access on her own

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. R.B. was identified as a student with disabilities attending the Adaptive Functional program at Henry Middle School. In anticipation of R.B.'s transition to high school, Ms. P.B. visited Lincoln High School in October, 1994. She conveyed her observations and her belief that Lincoln High School could not address R.B.'s individual needs in a letter to the District dated 11/15/94. As a result of observations and teacher interview, her concerns were:

   - Students are automatically mainstreamed and, if it appears that the student is failing, the special education staff would consider scheduling that student into the resource room for that particular subject.

   - Special educators do not act as a resource to regular educators. Regular educators do not receive copies of student's IEPs as it is their belief that a discussion of individual student needs, adaptations, or modifications would bias the regular educator. If a parent insisted, they would have the parent sign a release and in return they would hand a copy of that student's IEP to the regular classroom teacher.

   - Ninth grade students are not eligible for vocational experiences.

   - They do no have resources that allow for individual attention. The staff is unable to provide curriculum adaptation, modification, small group instruction, etc. because of budget constraints or cuts at the building level.

   - Little or no instruction was provided in the special education resource room having to do with educator competency.

5. On 5/25/95, an IEP was developed for R.B. for the 1995-96 school year.

6. According to Ms. P.B., she met with District special education administrators on 5/30/95 to discuss R.B.'s IEP relative to her concerns stated in the 11/15/94 letter. She was assured that Lincoln H.S. had adequate special education resources to support the IEP.

7. Ms. P.B. met with a District coordinator of special education and two special education teachers from Lincoln H.S. on 6/7/95 to review R.B.'s IEP and make course selections. According to the complainant, she was informed that "staff could not provide more than 45 minutes of ISIS" and that "typically they limit resource supports until they see how that student is going to do in regular education". Ms. P.B. conveyed some concerns about that meeting as well as her expectations, to the principal of Lincoln H.S. in a letter dated 8/28/95.

8. R.B. received homebound services during the first 19 weeks of the 1995-96 school year while she recovered from surgery.

9. Ms. P.B. met with sending and receiving special education teachers on 1/17/96 to discuss programming for R.B. at Lincoln H.S. beginning late January. During that meeting, the complainant states she was told, among other things:

   Lincoln cannot provide more than 45 minutes of ISIS a day.

   The special educators don't schedule the kids for more than 45 minutes of resource until after the first 6 weeks grading period.

   Lincoln doesn't have computers for special education students.

   Lincoln would provide a locker, but the parent has to provide the lock and key.

   R.B. would have to leave her last period class 20 minutes early to catch the special education bus.

   In a letter to R.B.'s service coordinator dated 1/18/96, Ms. P.B. expressed concerns about the school's policy to not make vocational or community experiences available to 9th graders and about support for the accommodations, modifications and adaptations needed in regular and special education, as listed on R.B.'s IEP.

10. R.B. entered Lincoln H.S. on 1/22/96. The complaint was written after R.B. attended Lincoln for 5 days.

11.. Ms. P.B., in her complaint, alleges that staff at Lincoln H.S. did not and does not provide consultation services.

   a. Consultive services are listed on R.B.'s service plan, stating that regular education will be provided "with consult". No amount of service is listed.

   b. The District, in its response to the complaint, indicates the S/L specialist serves as case manager for R.B. and provides 20 to 30 minutes per week of consultive services to other staff.

   c. The case coordinator indicates that she provides regular and ongoing consultation to all of R.B.'s teachers.

12. Ms. P.B., in her complaint, alleges that special education services provided to R.B. are limited to one 45 minute Math class 5 times a week.

   a. The following special education and related services were listed on R.B.'s IEP:

      - LD ISIS services to be provided 90 minutes per day, 5 days per week in addition to

      - LD Resource Room 90 minutes per day, 5 days per week and

      - S/L Itinerant services 30 minutes per day, 2 days per week.

   Ms. P.B. indicates the S/L services were not yet scheduled as of 1/29/96.

b. The District, in its response to the complaint, indicates that R.B. receives:

- LD ISIS services 45 minutes per day, 5 days a week;
- LD Resource Room 45 minutes per day, 5 times per week and
- S/L Itinerant Services 30 minutes per day, 2 days a week or 60 minutes per day 1 day per week.

The District states that staff met with Ms. P.B. on 2/9/96 (after this complaint was filed) to review R.B.'s schedule in an attempt to incorporate additional special education class services commensurate with the IEP. According to the District, Ms. P.B. requested that no changes be made in the existing schedule. At a subsequent meeting held on 2/26/96, the IEP was changed to reflect her schedule and services were changed to:

- LD Itinerant services 45 minutes per day, 5 days a week,
- LD Resource Room 45 minutes per day, 5 times per week,
- S/L Itinerant/resource 45 minutes per week,
- S/L Consultive Services 30 minutes per week and
- Participation in tutorial period before R.B.'s first class.

The District states that Ms. P.B. agreed to these changes.

c. By its own admission at the 2/9/96 meeting, the District did not provide all of the special education services listed on the IEP during the previous 3 weeks of school since R.B. entered Lincoln H.S. The District was willing to change R.B.'s schedule as of 2/9/96; however Ms. P.B. did not want the schedule changed. The IEP was changed on 2/26/96 to reflect current needs and service provision.

13. Ms. P.B., in her complaint, alleges no vocational experiences are being provided to R.B. due to Lincoln H.S.'s policy that 9th grade students are not eligible for vocational experiences. She states that regardless of what is written on an IEP, students are required to either complete the 9th grade or 65 credit hours in 9th grade before they are eligible for vocational experiences.

a. The following vocational experiences and/or services were listed on R.B.'s IEP:

- participation in community experiences such as supermarket, library, recreation program, etc., 1 X per week for 2 hours total,
- opportunity for 2 job shadowing experiences,
- one work experience during the year in the school or community for 1-2 hours, 2 days a week, and
- opportunity to explore vocational interests.

b. The District, in its response to the complaint, indicates that R.B. has participated in several community experiences (e.g., to a neighborhood library and to a neighborhood pet store), each 45 minutes in duration and that future community experiences are scheduled. Community experiences are limited to those facilitated by the speech/language specialist, according to the District, as Ms. P.B. would not allow members of the adaptive/functional staff to facilitate R.B.'s participation in community or vocational experiences. At the 2/26/96 meeting, Ms. P.B. agreed that one 45 minute period, 1 time per week would be an appropriate community based experience for R.B. based on her age and the years she has left in school.

Opportunity for 2 job shadowing experiences has not yet been provided, but job shadowing will take place before the end of the school year within the high school environment.

One work experience during the year in the school or community for 1-2 hours, 2 days a week, has not yet been provided but was to have been provided before the end of the school year. At the 2/26/96 meeting it was agreed that such exposure to work would be provided through a specific regular education class, "Community of Caring/Career Awareness Preparation", and a special education class, "Vocations", as well as through community based experiences provided by the speech/language specialist.

Some opportunity to explore vocational interests has been provided by the speech/language specialist. Additionally, in the two classes (above) R.B. will be exposed to career and vocational exploration.

14. Ms. P.B., in her complaint, alleges that neither general education staff nor special educators provide any of the adaptations and/or modifications listed on R.B.'s IEP as characteristics of service.

a. The following characteristics of services were listed on R.B.'s IEP:

- seating near front of room due to fluctuating hearing
- role playing and opportunities to problem solve
- redirection to activity/task
- small group instruction and one to one instruction
- transportation to/from school
- school or community based work program
- varied community experiences
- RTD transportation as appropriate
- career and academic counseling
- modified curriculum and shortened assignments
- use of calculator, computer, printer
- key locks for book, gym and electives lockers
- use of taped materials and cooperative assignments with peers so that she can access grade level materials which may be too challenging academically for her to access on her own

b. The District, in its response to the complaint, indicates:

The opportunity for RTD transportation has not yet occurred.

Career and academic counseling are and will be provided at appropriate times, during community based experiences, through the Community of Caring/Career Awareness Preparation and the Vocations classes and in other future vocational and/or transition classes as well as when situations present themselves.

(The school or community based work program and varied community experiences were addressed in #7, above.)

All the remaining modifications are and will continue to be arranged and provided as needed and as appropriate.

15. According to the complainant, she was contacted on 2/1/96 by the speech/language specialist who had been assigned as service coordinator who stated:

She really felt R.B.'s current schedule was appropriate.
She did not think that R.B.'s IEP accurately reflects her strengths, let alone her needs.
R.B.'s teachers feel that she is doing quite well without special education support.

16. Staff, during an onsite interview on 4/4/96, indicated that R.B. is doing very well, but definitely needs special education support.

17. An IEP meeting was held on 2/9/96 and the 5/24/95 IEP was revised via an addendum. That addendum stated:

re consultation: "While an ISIS delivery is not provided, based upon R.B.'s needs, intense consultation is."

re special education services: "While an ISIS delivery is not provided, based upon R.B.'s needs...." "Parent is concerned that IEP is not in compliance; staff is concerned that IEP may not reflect R.B.'s needs." "R.B.'s schedule can be modified to substitute special education English resource for general H.S. Reading class." R.B.'s service plan was changed to:

LD resource services with a special educator, 90 minutes per day 5 times per week
LD itinerant services with a special educator, 45 minutes per day 5 times per week
LD consult services from a special educator and speech/language specialist , 20 minutes 1 time per week
S/L itinerant services with a speech/language specialist 45 minutes 1 time per week
At a later date, a discussion will continue in terms of actual vocational/work experiences

re vocational experiences: "A vocations class will be scheduled for R.B. to address man of the practical living and pre-vocational need delineated in IEP goals and objectives." Community skills and experiences will...occur weekly.

re adaptations and modifications: "teacher...using adaptations." "Teachers in various classes are making adaptations." "In class, teacher does check for understanding."

18. Ms. P.B. did not agree with these changes in service and, on 2/12/96, requested a due process hearing. Her concerns were that educators did not provide documentation or evidence to support the reduction in services and she questioned their ability to determine R.B.'s needs due to the limited opportunity to work with her. Concern also existed relative to the continued minimization of functional, vocational and compensatory needs.

19. Ms. P.B. agreed to withdraw the request for a due process hearing and resolve differences through in-district mediation, in a letter dated 2/13/96.

20. The in-district mediation was held on 2/21 and 2/26 and resulted in an addendum to the 5/24/95 IEP which replaces the 2/9/96 addendum. The following services were agreed to and were to be initiated on 3/4/96.

45 minutes of resource and 45 minutes of itinerant and ISIS services, 5 times per week to address R.B.'s LD needs.

45 minutes of itinerant and resource speech language services, 1 time per week

30 minutes of speech language and LD consult per week

Ms. P.B. alleges she agreed to this reduction of services when the service coordinator said that all teacher's reported R.B. was doing great and earning straight "A"s. P.B. states she received a notice later that day that R.B. was in fact receiving "D"s in two classes.

21. Staff, during an onsite visitation and interview on 4/4/96, indicated R.B.'s grades have been all "A"s with one "B". The "D"s were only an interim grade reflecting non payment of fees at that time.

22. As of 3/25/96, the complainant alleges that staff continue to refuse modifications described on R.B.'s IEP, specifically:

A health plan has not been developed.
R.B. does not have access to a calculator, computer or printer as appropriate.
Modified curriculum and shortened assignments are not provided when appropriate.
Use of taped materials are not provided when appropriate.
Cooperative assignments with peers is a modification that is accepted only by the English and home economics teachers.

23. During an onsite interview at Lincoln H.S. conducted on 4/4/96, staff emphatically stated:

The health plan was developed after the mediation and prior to spring break, and is on file.

R.B. has access to a calculator in math class when she wants it.
R.B. has been receiving math tutoring one time per week in which she uses a calculator. She has recently opted not to use it, stating she doesn't need it.

"Tons" of computers are available at Lincoln, and some students even have their own lap top computers if needed. R.B. has access to a computer, she can take keyboarding, word processing and other computer classes. At this time her writing skills are quite adequate and there has not been a specific need to use the computer. Computers are available and she will be encouraged to use them as she needs to write lengthy reports.

The case coordinator meets with the reading teacher one time per week for 20 minutes and with the science teacher every Thursday morning. She talks often with all of R.B.'s teachers. Science tests are given orally. Reading materials are modified and assignments are shortened when necessary. R. B. is receiving all "A" grades with one "B".

Taped materials are currently not needed as her reading skills are adequate and she is receiving excellent grades.

Cooperative assignments are utilized when necessary.

24. During onsite visitation and interviews conducted 4/4/96, staff was asked to describe Lincoln's special education delivery and the interface between regular and special educators and to talk about implementation of IEPs, availability of computers and calculators, and building options for vocational and community based experiences. The following was reported:

Approximately 200 students at Lincoln receive special education services, through self-contained, resource, consultive and ISIS (combined special educator and regular educator in same classroom) models. Students entering Lincoln with a current IEP are provided those services. The only students who are placed into the mainstream for the first six weeks are those whose IEP lists "consultation" as the primary delivery. If after six weeks, staff believes direct service is necessary, they will convey an IEP meeting to discuss this.

All classes are provided in 45 minute and/or 90 minute periods. Some students receive specialized instruction all day from various special education service providers. Special education is never limited to two periods per day.

One counselor is assigned to all students with disabilities. He informs all regular teachers about needed modifications for students with disabilities and provides them copies of IEPs if appropriate. As an example, he made eight copies of R.B.'s IEP and distributed them to her teachers one week prior to her arrival.

A "community of caring" prevocational awareness class is available to all 9th grade students. The case coordinator/speech language specialist provides numerous community experiences, as do the teachers in self-contained programs. In-school work experiences are available. All of these are available to 9th grade students, based upon their IEPs.

"Tons" of computers are available throughout the school and in the special education classrooms. Several students have their own lap top computers, when deemed necessary as a result of an assistive technology evaluation. The special education teachers take their children to Room 119 for computer exposure. Calculators are available. Generally they are not given to students immediately in the math labs, but later as they work toward their use. R.B. has been provided with a calculator, but recently has expressed her desire not to use one.

25. It is clear that perceptions of school personnel and the complainant are vastly different.

Ms. P.B. alleges regular and special educators are not willing to provide necessary special education and supports and that district procedures exist which are in violation of the Act. She is concerned about her daughter's progress and that she is not receiving those services listed on the IEP.

School personnel, on the other hand, deny the existance of such procedures and indicate information has been taken out of context. They state that R.B. is very successful in school and that teachers are pleased with her performance. She is getting excellent grades and her self-concept is strong. They believe they are providing all the services listed on the IEP and are providing significant support to regular educators. They do not understand Ms. P.B.'s concerns.

III. CONCLUSIONS

The district, by its own admission did not provide all of the special education services listed on the IEP during the first 3 weeks of school. Subsequently the IEP was changed to reflect current needs and service provision and Ms. P.B. received appropriate notice of these changes. While, technically, this would be a violation of the Act, three weeks of reduced services would not constitute a failure to provide a free appropriate public education.

Although there is disagreement as to the current implementation of special education procedures and practices, there is no evidence to support the failure to provide a free appropriate public education to R.B.

IV. REMEDIAL ACTIONS

None.

Dated this _____ day of April, 1996

____

Carol Amon, Federal Complaints Investigator

Case Number: 96. 505

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Related Services
Individual Educational Plan

Issues:

- provision of weekly homebound OT/PT
- unilaterally changing service time through IEP addendum

Decision:

- District failed to provide 6 hours of OT service; however this does not constitute failure to provide FAPE
- Insufficient evidence of unilaterally changing IEP

Discussion:

FEDERAL COMPLAINT NUMBER 96.505

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was written on January 30, 1996 and received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on February 14, 1996.

B. The complaint was filed by Mr. J.C. and Ms C.C. on behalf of their child, J.C., against the Denver Public Schools, Mr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education("the District").

C. The timeline within which to investigate and resolve this matter expires on April 15, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G J.C. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to provide weekly homebound occupational therapy/physical therapy ("OT/PT") services to J.C. totaling 120 minutes per month and

- changing the amount of services on J.C.'s IEP from "120 minutes per month" to "as needed" through an addendum to the IEP, based on the availability of service rather than an IEP team's determination of what the student needed.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.C. was identified as an "other health impaired" student with physical disabilities at a triennial review on 2/7/95. The services to be provided, as listed on that IEP, are:

   a. OHI/PD homebound service from a homebound teacher, 60 minutes per day, 5 days per week,
   b. PD homebound service from an OT/PT provider, 1 time per week, 120 minutes per month and
   c. OH/PD consult service from a special educator as needed.

5. J.C. and C.C., the complainants, allege that "P.D. homebound service from an OT/PT provider, 120 minutes per month", has never been provided.

6. An addendum to the IEP, dated 5/16/95, states that the time and delivery system, "PD homebound service from an OT/PT provider, 1 time per week, 120 minutes per month" (b. above) is changed to "OHI/PD consult service by an OT/PT as needed", as the previous IEP, written in February, was not clearly representative of the District's provider times.

   a. J.C. and C.C., the complainants, state they were told this change was necessary since the district could not find a therapist to come into the home. Ms. C.C. clarified this further by stating this decision was not made at an IEP meeting, but rather, a special educator came to her home and asked her to sign this addendum. She stated the addendum was necessary because the District hadn't found anybody yet who could provide OT/PT services in the mornings (when J.C. was awake) and that this was needed to go into the records. Ms. C.C. stated she signed it, believing they were trying to find a therapist for mornings.

   b. The District, in its response to the complaint, states that "PD homebound service from an OT/PT provider, 1 time per week, 120 minutes per month" was recorded in error, as this was the service to be provided by Children's Hospital. The District was only to provide consultive services. The District alleges that: "this was definitely written incorrectly", "the parents (complainants) did not want direct

OT/PT services as they were most comfortable with those being received from Children's Hospital, "Ms. C.C. was not receptive to "anyone" visiting the home to provide services", and "the family did not want an additional therapist coming to their house at that time".

c. The person responsible for recording information on the IEP, stated during a telephone interview, that: this was strictly her error, she simply recorded what the child was already receiving from Children's Hospital and then recorded how the District was going to consult with that therapist. She stated there was never an intent to have two occupational therapy sessions as the child could barely handle one. She also stated that the understanding was that if therapy from Children's changed, the District would consider adding more direct therapy time.

7. An occupational therapist employed by the District, stated during a telephone interview, that she was asked to visit J.C. in his home in May, 1995. She had been informed there was a concern that therapy from Children's Hospital may be limited due to limited Medicaid funds for this service. After observing J.C.'s physical condition and learning that Children's was continuing the occupational therapy (which the mother did not want to terminate), her recommendation was that additional direct service from an occupational therapist not be provided. Because he was being seen by a District homebound teacher, a speech/language specialist and an occupational therapist from Children's, she felt energy conservation was important. She recommended that the District's occupational therapist consult with the homebound teacher. She believed it was important for J.C. to gain the tolerance to attend school, even on a part time basis, as peers are often more motivating to children at this age.

8. As a result of the error in recording services on the IEP and the above evaluation, a special educator met with Ms. C.C. in May to change the IEP by adding a general addendum(#6 above). She felt Ms. C.C. was comfortable with the change and that Ms. C.C. understood that she was to contact the district immediately regarding any changes in the Children's Hospital provision of services.

9. Reportedly, J.C. is now attending school and making excellent progress.

10. It is clear that the District and the complainants have opposite perceptions of what happened and what was to have been provided. The procedures available through CDE's Complaint Process do not allow for making credibility determinations about persons involved in the dispute. It is not possible to determine which of the parties' perceptions, the complainants' or District personnel's, are more credible. A review of documentation, alone, would suggest that the District did not provide direct PD homebound service from an OT/PT provider, 1 time per week, 120 minutes per month, from 2/7/95 to 5/16/95 which would total approximately 6 hours of service.

III. CONCLUSIONS

The only definitive conclusion is that miscommunication occurred relative to this matter. Documentation suggests the District failed to provide approximately 6 hours of occupational therapy to J.C.; however, failure to provide 6 hours of service would not constitute failure to provide a free appropriate public education. The parent/complainant has the burden of proving, beyond her word, the allegations. Insufficient evidence was provided to support the allegation that the District changed the amount of services on J.C.'s IEP based on the availability of service rather than on an IEP team's determination of need.

IV. REMEDIAL ACTIONS

None.

Dated this _____ day of April, 1996

____
Carol Amon, Federal Complaints Investigator

Case Number: 96. 507

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Related Services
Individual Educational Plan

Issues:

- Provision of modifications in one specific class
- Provision of special instruction, consultation
- Communication with parents

Decision:

- District did provide all modifications and services, except in one instance relative to test modifications

Discussion:

- District needs to be more specific in listing special education services on the IEP so that all will have the same understanding.

FEDERAL COMPLAINT NUMBER 96.507

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A completed complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on April 15, 1996.

B. The complaint was filed by Mr. D.N. on behalf of his son, T.N., against the Jefferson County Schools, Dr. Wayne Carle, Superintendent and Mr. Robert Fanning, Director of Special Education("the District").

C. The timeline within which to investigate and resolve this matter expires on June 14, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G T.N. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to provide a FAPE to T.N., specifically by:

- not providing the modifications listed on the individualized educational plan ("IEP") in modified-biology class and
- not providing those special education and related services listed on the IEP which were the responsibility of Miss K., from 2/29/96 to 4/8/96, specifically:
  small group instruction 50 minutes per week,
  consultation with regular education teachers, 0-30 minutes per week,
  individualized reading instruction 30 - 90 minutes per week and
  communication with parents as needed

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.5,300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. T.N. was identified as a 9th grade student with perceptual communicative disabilities on an IEP dated 5/19/95. That IEP lists the following services to be provided to T.N.:
   small group instruction 50 minutes per week,
   consultation with regular education teachers, 0-30 minutes per week,
   individualized reading instruction 30-90 minutes per week and
   communication with parents as needed
   modified classes as available.

   Special education services were to be provided in a resource room, and T.N. was to be in regular education without special education support 84% of the time. Attached to the IEP is an Individualized Interventions Checklist which lists accommodations and modifications to be provided to T.N. in his regular education classes.

5. Mr. D.N. alleges the following:

   a. Modifications listed on the IEP are not provided by regular education teachers. When asked to be specific, Mr. D.N. stated that a biology teacher, Mr. C., would not allow T.N. to take one test orally and as a result he failed the test and subsequently was dropped from this class.

   b. All special education services provided by Miss P.K. were unilaterally terminated on 2/29/96 by the school principal and not resumed until 4/8/96. These included:
      (1) small group instruction, 50 minutes per week,
      (2) consultation with regular education teachers, 0-30 minutes per week,
      (3) individualized reading instruction, 30 - 90 minutes per week and
      (4) communication with parents, as needed.

      Mr. D.N. alleges that #3, individualized reading instruction, was never resumed during the remainder of the school year. He alleges this change in services occurred without reconvening the IEP team and without providing written notice.

   c. "Modified classes as available" is not appropriate language for an IEP; rather, it should state "modified classes as needed".

6. The District, in its response to the complaint, denies these allegations and states the following:

   a. All modifications were implemented as appropriate; however T.N. has chosen not to always accept them as demonstrated by his unwillingness to have assignments read to him or report to Miss K.'s classroom to receive special assistance, even though this was offered to him. Mr. J.C., a biology teacher states in writing, "Yes these modifications were met thru the modified documents (utilized cards for test, quizzes, worked with partners, etc.)." Another biology instructor writes, "All of the modifications listed here, with the exception of "taped reading material" were implemented and followed consistently by [T.N.] throughout the year. If [T.] had requested the use of a taped assignment it surely would have been done." Three additional teachers provided written statements assuring modifications were provided.

      The District goes on to state that "At no time did Mr. [C.] state that he would not follow [T.'s] IEP. However, [T.] did refuse to have a Biology exam read to him by [Ms.K.] during the Spring semester. According to [Ms. K.], [T's] former primary provider, [T.] refused on a couple of occasions to accept the modifications that she had provided him in other areas as well. For example, she indicated that [T.] didn't want to use taped books as a means of modification for reading assignment, so she purchased Cliff notes to assist him. "

   b. T.N. was and is receiving the amount of specialized instruction as displayed on his IEP. Specifically, during the fall semester T.N. had a Language Arts class that met each day for a total of 50 minutes. Specialized reading instruction was provided during this period of time. During spring semester, T.N. received small group instruction for one period per day and was offered access to the "Access period" from 7:30 to 8:00 each day which was taught by Miss. K. Miss K. was to have provided individualized reading instruction during the access period or during her free period which also coincided with T.N.'s free period. T.N. often did not avail himself of these periods, however.

   c. The principal, during a telephone interview, acknowledged that T.N.'s primary service provider, which is really a misnomer for "case manager" was changed from Miss. K to the school psychologist. The amount and type of special education services did not change, however.

7. The law clearly states that the written IEP for each child shall include statements of specific special education and related services, including transition services, when appropriate. Such statements shall include the specified amount of services to be provided so that the commitment of resources and the manner in which services will be delivered will be clear to all who are involved in both the development and implementation of the IEP. Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.

   Also, if modifications to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP. This applies to any regular education program in which the student my participate including physical education, art, music, and vocational education.

8. A review of the District's IEP for T.N. indicates that while it is comprehensive and meets the requirements of the law, two descriptions of service to be provided are not specific. "0 - 30 minutes per week" could mean that no consultation would ever be provided. There is no indication of why a range is necessary and who is to make that determination based upon what. "Modified classes as available" was added to the IEP; however the provision of special education services must not depend upon availability. It is not clear if this refers to special education or regular education, and clearly needs to be more specific.

III. CONCLUSIONS

The District did not violate the provisions of the Act by failing to provide a FAPE to T.N. Many teachers clearly provided modifications in their regular education classrooms. There is a discrepancy in opinions as to whether T.N. was allowed to take one biology test orally, but even if he had not, one failure to provide a modification would not constitute a denial of FAPE. Although the case manager was changed by building administration and there was a change in scheduling, all special education services listed on the IEP were made available to T.N.

The District needs to be more specific in listing special education services on the IEP so that all persons have the same understanding of what is to be provided.

IV. REMEDIAL ACTIONS

None.

V. RECOMMENDATIONS

It is recommended that special education services and modification be listed very specifically on T.N.'s future IEPs so that there is no misunderstanding as to what services will be provided, by whom and in what manner.

Dated this _____ day of May, 1996

Carol Amon, Federal Complaints Investigator

Case Number: 96. 508

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Individual Educational Plan

Issues:

- Provsion of consultation, small group instruction and modified curriculum

Decision:

- By its own admission, school needs to provide individualized special education
- Regular teachers not provided information relative to IEP
- Services not specifically enough written

Discussion:

- As a result of complaint, staff at one school has changed its policies relative to special education

FEDERAL COMPLAINT NUMBER 96.508

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. The complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on April 3, 1996.

B. The complaint was filed by Ms. C.V. on behalf of her son, S.V., against the Jefferson County Schools, Dr. Wayne Carle, Superintendent and Mr. Robert Fanning, Director of Special Education("the District").

C. The timeline within which to investigate and resolve this matter expires on June 3, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G S.V. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide the following services listed on S.V.'s indiviualized educational plan ("IEP") dated 11/15/95:

- consultation plus regular education (learning strategies), 250 minutes per week,
- small group instruction for language arts/reading/math, 250 minutes per week and
- modified curriculum as needed.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. S.V. was identified as a student with a perceptual communicative disorder on an IEP dated 11/15/95 The services to be provided, as listed on that IEP, were:

   Consultation plus regular education (learning strategies), 250 minutes per week

   Small group instruction for language arts, reading and math, 250 minutes per week

   Modified curriculum as needed

5. The complainant alleges the following services were not provided; the District's response to these allegations follows, as well as the complainant's reply to the District's response:

   a. *Consultation plus regular education (learning strategies), 250 minutes per week*

   The complainant states that, during the first semester, consultation was provided through a learning strategies class, a special education course which in essence is a study hall conducted by one of the special education teachers. During the second semester, however, due to scheduling conflicts, consultation with his regular education teachers was to be an ongoing process to assure that he was achieving academic success.

   At a parent/teacher conference held on 3/13/96, the complainant learned that S.V. was failing two of his regular education classes, had a "D" in one and a very low "D" in another. Two of the four teachers of these classes were not aware that S.V. was a student with disabilities whose IEP called for modifications.

   According to the complainant, S.V.'s special education case manager stated that she is not allowed to give regular education teachers copies of IEPs and that she had not yet had time to consult with these teachers.

Ms. C.V. met with the principal on 4/15/96 during which time he indicated that he and the staff at Columbine made a professional decision not to inform regular education teachers about special education students because they were concerned that it might cause additional problems for the special education students.

The District states that Ms. C.V. unilaterally changed S.V.'s schedule, removing him from the Learning Strategies class for the spring semester and that she did not notify the case manager. Therefore, special education could not be provided.

Ms. C.V., in her reply to the District's response, denies this and states that the school does not offer a continuum of services; rather, it only provides special education through the Learning Strategies Class and that class is not available every period of the day.

The District also states that S.V.'s teachers were made aware of S.V.'s special education needs as demonstrated by a Memo to all teachers from the Special Education Staff which lists the names of 118 students in special education and the grade they are in. S.V.'s name was on that list. No specific information about any of these 118 students was provided. Teachers were instructed to contact special education teachers if they had concerns or questions.

The District, in its response, recognizes that this issue needs to be resolved and that it is in violation of the IEP and is willing to reconvene the entire IEP team to discuss this matter and bring closure to this outstanding concern.

b. *Small group instruction for language arts, reading and math, 250 minutes per week*

There are no allegations relative to this service, as S.V. is getting an "A" in his EH Language Arts class and the teacher of that class has indicated that S.V. comes to class prepared to work and is always on task. S.V. has not received support in math since he continues to experience success in the regular classroom setting.

c. *Modified curriculum as needed*

The complainant alleges that, although no specific modifications were listed as part of the IEP, it was agreed that modifications would be made if S.V. began to flounder in any of his regular education classes. As stated above, at a parent/teacher conference held on 3/13/96, the complainants learned that S.V. was failing two of his regular education classes, had a "D" in one and a very low "D" in another. Two of the four teachers of these classes were not aware that S.V. was a student with disabilities whose IEP called for modifications.

The case manager had not informed these teachers about S.V.'s needs, nor was she aware of his floundering or failing any classes.

A list of specific modifications was prepared by the District and the complainant on 4/3/96, and the list was distributed to S.V.'s teachers. According to Ms. C.V., S.V.'s case manager told Ms. C.V. that one of the teachers said (s)he would not allow S.V. extra time to complete any assignments as (s)he always allows enough time for every assignment and no one would be given any extra time.

The District, in its response to the complaint, denies this allegation, stating it has implemented numerous modifications and accommodations to address S.V.'s educational needs. According to the District, staff have been informed of his special learning needs, expectations regarding classroom assignments have been altered, numerous communication systems have been established, monitoring systems have been developed and are currently being used, and requests for class changes have been honored.

The complainant, in her reply to the District response, states that curriculum modifications and accommodations have recently been implemented and that a strong communication system has been established between the case manager and herself.

6. The law is clear relative to the need for students' regular education teachers to participate in the development of IEPs or, if unable to do so, the school must provide the regular teachers with copies of the IEPs or inform the teachers of their contents. Moreover, the school must ensure that the special education teacher, or other appropriate support person, is able, as necessary, to consult with and be a resource to the child's regular teachers.

7. The staff at Columbine High School, according to the District's response to the complaint, have recently met to further articulate roles and responsibilities relative to serving students with disabilities. Special education staff have agreed to communicate in writing with regular classroom teachers regarding students' IEP needs and accommodations during the first two weeks of the semester and will follow-up as needed with staff. They have also agreed to establish student case loads to take advantage of student contacts with specific teachers and maintain a balance of numbers served between service providers.

III. CONCLUSIONS

1. By its own admission, the District and Columbine High School recognize: (1) the need to improve the interaction between special educators and regular educators and (2) the need to provide special education in an individualized manner, not just through a Learning Strategies class which has limited offerings.

2. The District violated the provisions of the Act when it neither gave a copy of S.V.'s IEP to his regular classroom teachers nor provided those teachers with information about the contents of the IEP. It logically follows then that those teachers would not have been able to provide the modifications and accommodations listed in the IEP, and this also is a violation of the Act. To suggest that Columbine High School met its obligation by providing all teachers with a list of names of 118 students in special education, is absurd.

3. The District's and the complainant's perceptions of what occurred at meetings, how schedules were changed and what was meant by specific statements on the IEP are quite disparate; however, the process of complaint resolution does allow for taking testimony under oath for determining credibility. Clearly there is not a common understanding of what is required in this IEP. If a special education service called "learning strategies" is listed on the IEP, this must be provided and neither the parent nor the District can unilaterally delete this. If scheduling conflicts arise, the IEP team must reconvene to determine what service will meet the needs of the student. In addition, to simply state, "modified curriculum as needed" without specifying what modifications or who is to make the decision based upon what, is not specific enough so that the commitment of resources and

the manner in which services will be delivered is clear to all who are involved in both the development and implementation of the IEP.

4. As a result of this complaint, staff at Columbine High School have initiated dialogue and made decisions relative to the improvement of special education services within the school. This dialog needs to continue.

5. The complainant also has stated that curriculum modifications and accommodations have recently been implemented and that a strong communication system has been established between the case manager and herself.

IV. REMEDIAL ACTIONS

On or before the beginning of the next school year, the District must reconvene an IEP meeting for S.V. and determine what modifications and special education and related services are needed to meet his needs. Such services must be specific in type and amount so that the commitment of resources, the manner in which they will be delivered and individual responsibilities are clear to all who are involved in both the development and implementation of the IEP. A copy of that IEP must be forwarded to this office no later than one week after its development.

Dated this _____ day of May, 1996

____
Carol Amon, Federal Complaints Investigator

Case Number: 96. 509

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Student Evaluation
Related Services
Individual Educational Plan

Issues:

- provision of assistive technology needs and services

Decision:

- District did provide evaluation and IEP team is still in process of determining device

Discussion:

- "Appropriate" device or system must be determined by team

FEDERAL COMPLAINT NUMBER 96.509

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on April 8, 1996.

B. The complaint was filed by Mr. M.L. and Ms. P.L. on behalf of their daughter L.L. , against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent and Dr. Joe Hendrickson, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires on June 7, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G L.L. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to provide an evaluation of assistive technology needs and
- failing to provide a needed assistive technology device and services.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), (25) and (26) and 1414,

34 C.F.R. 300.2, 300.5, 300.6, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. L.L. was identified as a student with multiple disabilities as documented by an individual education plan ("IEP") dated 10/18/94. With regard to assistive technology evaluations and/or services, that IEP states: "SWAAC consultation" is to be provided as a characteristic of service. An addendum to that IEP dated 5/22/95 indicates that "a computer and software will be loaned to the family by PR-1 school district for the summer. Use of the computer and software will be paired with speech practice."

   A new IEP dated 11/21/95, states that L.L. needs to explore communication systems. An Addendum to the IEP dated 11/21/95, states:

   > [L.L.] will be given a trial period for use of the Digivox and Dynavox in the home and school settings. This period of time will be used to evaluate what form of assistive technology best meets [L.L.'s] needs. Trial periods with these devices will be completed and a recommendation regarding assistive technology will be made by the end of March 1996.

5. The complainants, in the original complaint and in subsequent written communication, allege that:
   no recommendation has been received,
   evaluations have been perfunctory,
   no trial period was provided in the home setting, and
   no trial period was provided in the school classroom.

6. The District responded to each of the above allegations as follows:

   a. no recommendation has been received

   A four page SWAAAC Evaluation Report dated 4/8/96 and signed by three speech/language specialists (including K.M.) and one occupational therapist, states "It appears that the communication device that would best meet [L.L.]'s communication needs is the Dynavox..." and it lists five criteria upon which this determination was made. The recommendation does not stipulate whether this is the original Dynavox, the new Dynavox II or Dynavox software. An IEP team has yet to incorporate these recommendations into an IEP.

The complainants had not yet received a copy of this evaluation/ recommendation when they filed the complaint. During a telephone interview, Ms. P.L. stated she received it on 4/18/96.

The District, in it's response, states that the time to evalute the assistive technology needs of L.L. was extended by K.M, the speech/languge specialist and Mr. M.L., L.L.'s father, on March 26, 1996. A report from K.M. to the Director documents this decision. Ms. P.L., however, states this did not happen.

b. *evaluations have been perfunctory*

The District, in its response to the complaint, states that evaluations have been very thorough and professional. The SWAAAC Evaluation Report describes L.L.'s current communication functioning and lists her assistive technology history beginning 2/16/94 with a communication board using photographs and ending 3/22/96 with the Dynavox. The Digivox was tried in her classroom for a three week period around the 2/26/96 time period.

K.M., the speech/language specialist indicated the length and breadth of the evaluation was appropriate for the age of the student.

c. *no trial period was provided in the home setting*

The SWAAAC Evaluation Report indicates the Digivox was provided for home use sometime around the 2/26/96 time period.

Documentation provided by the District shows that Mr. M.L. met with K.M., the speech/language specialist on 3/26/96. During that time K.M. familiarized M.L. with basic information regarding the programming and use of the Dynavox necessary for it to be used at home. They discussed how it would be used at home and how it would be transported home. They agreed that this particular Dynavox (an older version) would be too heavy for L.L. or her sister to carry back and forth from home to school every day. Mr. M.L. said that he would pick up the Dynavox every Friday to take home for L.L. to use over the weekend, and that he would return it to school on Monday mornings. Neither Mr. M.L. nor Ms. P.L. picked up the Dynavox on any Fridays during the trial period at school, nor did they contact K.M. regarding a change in plans.

The District also provided a copy of a hand written letter from Ms. P.L. to K.M. which states: "[M.L.} said he owes you an apology-he said he did agree to take device home on Fridays and back to school on Mondays..."

d. *no trial period was provided in the school classroom*

Documentation provided by the District shows that the Dynavox was delivered to the school on 3/19/96, but without the manual or instructions. After finally receiving the instructions and learning how to use the device, it was programmed for L.L.'s use beginning on 3/22/96. L.L. used the device for nine days and it was returned on 4/10/96. K.M. had four opportunities to observe/work with L.L. using the Dynavox.

7. The complainants also allege that L.L.'s IEP clearly states the need for an assistive technology device and that the District has blatantly stalled at providing the services and device she needs.

   In a 5/20/96 telephone conversation, Ms. P.L. stated that District administration is unwilling to provide the Dynavox II, and is only willing to provide the old, heavy Dynavox or a lap top power book (computer) with Dynavox software.

8. The District, in its response to the complaint, states that assistive technology has been, and is currently being, used by L.L. The SWAAAC evaluation indicates that various types of assistive technology have been explored since 2/16/94 including a communication board, Message Mate, Dynavox, Digivox and Macaw. Notes from a meeting held on 4/19/96 indicate that the old Dynavox was recommended and was available, that Mr. M.L. is concerned over its weight and size and would like to try something else. A new lighter Dynavox was discussed but is not yet available. A computer on a cart for the building was offered.

   K.M., the speech/language specialist, indicated in a telephone conversation that the new Dynavox II will not be available until the fall. In a 5/21/96 telephone conversation with the Director of Special Education, he stated that the SWAAAC evaluation team will consider the appropriateness of the power book and Dynavox software, utilizing the criteria which were determined to be essential in a communication device for L.L.

9. CDE's consultant in assistive technology was asked to review information relative to the quality of the SWAAAC evaluation and recommendation. She stated that, based on a review of the paperwork only, both seemed to be appropriate. She stated that assistive technology devices are determined by IEP teams to be those which provide the student with reasonable benefit. This usually means that there are choices and depth of the program commensurate with the student's languge level and learning level. New or updated devices are always emerging, according to this consultant, however schools need only provide an "appropriate" device, not necessarily the "best on the market".

9. The complainants are requesting an independent educational evaluation ("IEE") at either Children's Hospital or Easter Seals, immediate procurement of the recommended device and immediate provision of assistive technology services, including training L.L.'s teacher(s) in the use of the device.

III. CONCLUSIONS

1. The District has not violated the provisions of the Act by failing to provide an evaluation of assistive technology needs. An Addendum to the 11/21/95 IEP states that L.L.'s needs for assistive technology will be evaluated and a recommendations made by the end of March, 1996. No previous IEP addressed the need for such an evaluation, only consultation. The recommendation for a device was made on April 8, 1996 but not received by the complainants until April 18, 1996. Although there is a difference of opinion as to whether or not Mr. M.L. agreed to this time extension, an eighteen day delay would not constitute a denial of a free appropriate public education. Allegations that the evaluation was perfuntory, that no trial period was provided in the home setting or the school classroom were not substantiated.

2. The parents/complainants of a child with a disability have the right under the Act to obtain an IEE of the child at public expense if they disagree with an evaluation obtained by the District. The District must either provide the parent with information about where an IEE may be obtained at District expense or initiate a hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. Such request should be made to the Director of Special Education.

3. The District has not yet provided a permanent assistive technology device and accompanying training, however this has not yet been determined appropriate by an IEP committee. The SWAAAC team has made its recommendation and the IEP committee must now act on that recommendation. Therefore, the District has not yet violated the Act by failing to provide a needed assistive technology device and services.

IV. REMEDIAL ACTIONS

None.

V. RECOMMENDATIONS

It is recommended that, as soon as possible, the District's IEP team reconvene to act on the SWAAAC team's recommendation. The IEP team needs to determine which device and accompanying services are to be provided and that determination must be made considering the SWAAAC team's evaluation report and any information the parents have from an IEE. The District should then provide any device and/or services determined to be appropriate by the team. "Appropriate" would be that device and/or service that, according to the IEP team, allows L.L. to obtain reasonable benefit. Should the parents disagree with the decision of the IEP team, they may exercise their right to appeal.

Dated this _____ day of May, 1996

Carol Amon, Federal Complaints Investigator

Case Number: 96. 512

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Related Services
Individual Educational Plan
Compensatory Services

Issues:
- Provision of speech language services and instruction from teacher of hearing impaired

Decision:
- District/BOCES did fail to provide approximately 20% of service
- Compensatory services ordered

Discussion:
- Resource allocation an issue. Must take into consideration time needed for professional growth, potential illness, etc.; cannot just skip service

FEDERAL COMPLAINT NUMBER 96.512

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on June 5, 1996.

B. The complaint was filed by Mr. G.M. and Ms. J.M. on behalf of their son, Z.M. against the Steamboat Springs Schools, Dr. Cynthia Sickman Simms, Superintendent ("the District") and the Northwest Board of Cooperative Educational Services, Mr. Edward M. Vandertook, Executive Director and Ms. Jane Toothaker, Director of Special Education ("the BOCES").

C. The timeline within which to investigate and resolve this matter expires on August 5, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District and the BOCES as recipients of federal funds under the Act. It is undisputed that the District and the BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G Z.M. is a student with disabilities eligible for services from the District and the BOCES under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCES have violated the provisions of the Act by failing to provide to Z.M. a FAPE including the following special education services as listed on his current individualized education plan ("IEP") of 8/28/95:

- individual speech language services 4 hours monthly, and
- teacher of hearing impaired direct service 12 hours a month and consultation with teachers 2 hours per month.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20) and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCES were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and BOCES, in part, based on the assurances contained within its application.

3. One of the assurances made by the District and BOCES is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. Z.M. was identified as a student with a hearing disability as documented on an IEP dated 8/28/95. That IEP lists the following services and methods of delivery to be provided from 8/28/95 to 8/96:
   - S/L (speech/language) therapy, individual, 4 hrs. monthly by the SLP (speech/language pathologist)
   - Full time classroom interpreter by Fanning
   - Teacher of hearing impaired direct services, 12 hrs. a month by Sullivan
   - Teacher of hearing impaired consultation with teachers, 2 hr. a month by Sullivan

5. The complainants allege that individual speech/language services were not provided as scheduled, specifically only 29 hours were provided of a possible 36 hours. They also allege that direct services of the teacher of hearing impaired were not provided as scheduled, specifically only 85 hours were provided of a possible 102 hours.

6. The District and BOCES, in their response to the complaint, listed all days each of these services were and were not provided. Specifically, they agree with the complainants' calculation that speech/language services were provided for 29 hours out of a possible 36 hours, and that direct services of the teacher of hearing impaired were provided 83 and 1/2 hours out of a possible 108 hours. Reasons for the above were that the speech language therapist was hospitalized with an unexpected illness and that the teacher of hearing impairment was either needed in other areas of the BOCES, needed to take another student to the Aspen Camp, and/or was attending statewide trainings and other professional conferences. The District and BOCES allege that missed time with the teacher of hearing impaired was compensated for when the teacher took Z.M. to Fort Collins for Host Day where he received one-on-one service for the entire day and when he participated in a ski weekend and the teacher of hearing impaired was responsible for him.

7. In addition, the District and BOCES disagree with the complainants' statement that they have made repeated attempts to resolve this issue. The Director of Special Education indicates she was contacted two times, the first time resulting in increased length of

sessions and the second time resulting in her suggestion that the IEP be changed to utilize a range of service time per month to allow for typical interruptions such as school breaks, absences, special events, etc. The Director of Special Education indicated by telephone message to this complaint investigator and in her response to the complaint, concern that the complainants did not bring this issue to the Superintendent prior to filing the complaint.

8. The law is clear that those services listed on the IEP must be provided. State regulations indicate that the IEP must "include the specified amount of services to be provided so that the commitment of resources and the manner in which services will be delivered will be clear to all who are involved in both the development and implementation of the IEP". Federal regulations indicate that "the amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be...stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP. Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services could be made without holding another IEP meeting."

9. The law is also clear in stating that sufficient personnel must be available to provide for identification, referral, assessment, determination of disability/eligibility, development and review of IEP and for instructional and related services to implement IEPs.

10. Documentation provided by the complainants and the BOCES shows that Z.M. was not provided approximately 20% (24-30 hours) of the direct speech/language and hearing services listed on his IEP. The District and BOCES must employ sufficient personnel to provide those services. Time for professional meetings, inservice training, service provision during illness and other duties must be calculated when determining sufficient personnel. Although there may be fluctuation in scheduling, missed direct services must be made up. Taking a student skiing or on other recreational trips does not automatically substitute for those services listed on the IEP. Should the services providers and parents agree to that substitution, it would be permissible.

11. There is no requirement in the law to exhaust all local remedies prior to filing a federal complaint. This complaint investigator, however, is perplexed at the District's and BOCES' concern that there was no or little attempt to resolve this issue locally. Upon receiving a telephone call from Ms. J.M. and listening to her concern, this complaint investigator called and spoke with the Director of Special Education regarding this matter. She suggested that, if these allegations were accurate, the BOCES may be in error and may want to settle this matter with Ms. J.M. locally without going through the formal complaint process. Ms. J.M. wanted to resolve this locally and was not seeking hour-for-hour compensatory services, but rather confirmation that services as written on the IEP must be provided regardless of service provider's illness or participation in professional activities. The Director of Special Education said firmly that she had spoken to Ms. J.M. about this and was not willing to negotiate or discuss this any further. When the complaint investigator asked, "Are you saying the only avenue Ms. J.M. has is to file a federal complaint?", the answer was affirmative. Being somewhat surprised at this response, this complaint investigator checked further and said, "I need to return a call to Ms. J.M.; are you saying you do not want to try to resolve this locally and that she needs to file a complaint if she believes she is correct?" The answer again was affirmative.

12. According to Ms. J.M., a new IEP has been developed for the 1996-97 school year. Services to be provided include individualized speech/language direct instruction 4 hours monthly and direct instructional services of the teacher of hearing impaired 10-12 hours monthly.

III. CONCLUSIONS

The District and the BOCES did violate the provisions of the Act by failing to provide to Z.M. approximately 20% of the direct services listed on his IEP during the 1995-96 school year.

IV. REMEDIAL ACTIONS

On or before September 30, 1996, District/BOCES personnel must meet with the complainants to devise a plan for the delivery of direct service should the speech language specialist and/or the teacher of the hearing impaired not be available. Services may be delivered by someone else or delivered later. Such plan, to be incorporated into or attached to the IEP, shall assure that services listed on the 1996-97 IEP will be provided. They also must develop a plan for some additional services to be provided to Z.M. this year to generally compensate for those services not provided last year. Such services should generally compliment the current IEP and need not be an hour-for-hour compensation. A copy of the above decisions must be forwarded to this office no later than one week after they have been made.

V. RECOMMENDATIONS

It is recommended that the BOCES take into consideration time needed for professional growth, other obligations and potential illness, when determining resource allocations of speech language and hearing specialists, so as to allow for all services listed on IEPs to be provided.

Dated this _____ day of August, 1996

Carol Amon, Federal Complaints Investigator

Case Number: 96. 514

Status:	Complaint Decision
Key Topics:	Procedural Safeguards Discipline

Issues:

- Manifestation determination and written notice

Decision:

- District did technically fail to provide notice, manifestation, etc.
- District did offer special education and related services during the period of disciplinary removal

Discussion:

- District appears to have not yet distinguished between those procedures required for expulsion and those procedures required for change in placement. Did not effect child who has been incarcerated. New procedures must be developed; IEP offered upon return.

FEDERAL COMPLAINT NUMBER 96.514

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on July 9, 1996.

B. The complaint was filed by Ms. F.C. on behalf of her son H.S. , against Adams District 12, Ms. Judy Margrath-Huge, Superintendent and Dr. Allan Cohen, Director of Special Education ("the District")

C. The timeline within which to investigate and resolve this matter expires on September 6, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. H.S. is a student with disabilities who was eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to provide written notice of the proposed change in placement resulting from expulsion,
- failing to determine whether misconduct was a manifestation of Hugh's disability and failing to state the basis for that determination,
- failing to determine whether Hugh was receiving appropriate special education and related services and whether the misconduct was due to an inappropriate placement,

- failing to provide an explanation of applicable procedural safeguards, specifically the right of the parent to initiate an impartial due process hearing to challenge the manifestation determination and change in placement, and
- failing to provide special education and related services during the period of disciplinary removal.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343 and 300.500-513

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. H.S. was identified as a 13 year old student with disabilities on an individualized education plan ("IEP") resulting from a triennial review, dated 9/19/96. Educational, communicative and social functioning were informally assessed prior to that IEP. The IEP indicated that H.S. was to participate in ordinary education 100 percent of the time and receive one-half hour of counseling per week from a social worker. H.S. was not in attendance at that meeting. The report on his social/emotional functioning indicates that "in April, '95, H. was expelled from school for a series of problems...Once again H. is now out of school and involved with the law". (Later reports indicate a specific incident occurred on 9/9/95). The social history/triennial update prepared by the social worker on 9/18/95 states,

> "H. is a repeating 7th grader due to the expulsion in April, 1995. H. had numerous incidences at school and in the community that led to the expulsion. It was determined at the time of the hearing that this behavior was not related to any emotional disability. At the beginning of the 1995/96 school year, H. was concerned with what measures he could take to go on to the 8th grade as soon as possible. However, H. is presently out of school, due to an alleged legal problem. His behavior seems to be more delinquent in nature and again, not due to an emotional disorder. It is the opinion of the staffing team that H. understands cause and effect and consequences of specific behaviors. He chooses to behave in a way that has serious consequences in the community."

5. Ms. F.C., in her complaint, states that H.S. was expelled sometime during the first few weeks of September, 1995, that she was not invited to participate in the expulsion proceedings. She states that she feels H.S. needs more counseling and/or special education services including special classes rather than regular education which attempts to get rid of a problem student. She states that H.S. is a cast off with no options offered by the district.

6. In its response to the complaint, the District stated that a manifestation hearing was held on 9/26/95 to discuss H.S.'s behavior in the incident that occurred on 9/9/95 and to determine if the behavior was a manifestation of his disability. According to a memorandum dated 8/29/96 from the social worker, Ms. F.C., H.S., an officer, the assistant principal and the school social worker were in attendance at this meeting. The social worker states that it was decided that H.S.'s behavior in the incident was not a manifestation of his disability. Also, according to the social worker, Ms. F.C. signed that she was present and agreed with this decision and that this was noted on the IEP dated 9/19/95.

   A review of the IEP, however, does not reveal this discussion or signature. A notation indicates that the IEP was reviewed with F.C. on 9/26/95, but the IEP includes no records of a manifestation discussion or determination. Also, the District provided no documentation of a written notice of this meeting.

7. A memorandum on file from the school social worker "to whom it may concern:", dated 9/29/95, states:

   "This letter is in reference to H.S., a student attending Niver Creek Middle School. H. has been referred to the School District level for a hearing to determine if he should be expelled. It continues to be the staffing team's decision that the crime H. is being charged with was not a result of his emotional disability. He seems to be making choices with the full knowledge of the consequences. His academic performance and behavior at school this year has been appropriate. This decision is also noted in the school social work report that was completed at the triennial review this month." There is no indication as to whom this was sent.

8. Ms. F.C. and H.S. were notified by certified letter dated 9/26/95, of an expulsion hearing to be held on 10/3/95.

9. Ms. F.C. and H.S. were notified by certified mail on 10/3/95 of the results of the expulsion hearing and that H.S. will be expelled for the remainder of the 1995-96 school year. The letter detailed the process for appeal of the expulsion and also stated that "H. and his parent should contact Dr. Allan Cohen, Director of Special Education, 451-1173, regarding academic support during the expulsion." In its response to the complaint, the District states the Ms. F.C. and H.S. attended the expulsion hearing.

10. The director of special education states in the District's response to the complaint, that he was contacted by the county probation officer after H.S. was in a placement facility, wanting to know if H.S. could return to school after he completed his placement obligation. The director informed the probation officer that H. S. had been expelled through the end of the 1995-96 school year but that when he was released from his placement, the District would provide for his IEP needs which consisted of counseling services. The director states that he did not hear back from the probation officer nor from Ms. F.C. as to the release date. Although the district stood ready at all times to

provide H.'s services during his expulsion, he did not avail himself of these services, according to the director.

11. During a telephone conversation with Ms. F.C., she indicated that H.S. was incarcerated as a result of the 9/9/95 incident. He was released this past summer but was ultimately placed in a halfway house due to a probation violation. He is expected to be released in December and return to Adams District 12 in January, 1997.

REGULATIONS AND ANALYSIS OF EVENTS/DOCUMENTATION

When a school district suspends or expels a child with a disability, this action triggers specific legal rights under the Act. An expulsion is considered a change in placement under the Act and before a change in placement can take place, the school district must provide written notice. Such notice must be provided to the parents a reasonable time before the proposed change in placement takes effect. It must include the determination that the student's misconduct was not a manifestation of the student's disability and the basis for that determination and an explanation of applicable procedural safeguards, including the right of the student's parent to initiate an impartial due process hearing to challenge the manifestation determination and to seek administrative or judicial review of an adverse decision.

A group of persons knowledgeable about the student (presumably, the same body that determines the student's IEP) must determine whether the conduct was a manifestation of the child's disability and whether the child's conduct resulted from an inappropriate placement. If it was not, the student may be expelled, provided applicable procedural safeguards are followed and special educational services continue during the period of disciplinary removal. A student with a disability must be reevaluated before any change in placement is implemented. Manifestation determination may not be made by the same individuals responsible for the school's regular disciplinary procedures and may not be made unilaterally by one individual, but they may be included in the meeting.

A review of documentation regarding this complaint reveals the following:

Provision of written notice of change in placement within a reasonable time
There is no documentation of written notice of change in placement having been given to the parent. A general memo to "whom it may concern" is in the file, but there is no indication this was given to the parent and the parent states that she did not receive this. Notification of an expulsion hearing was provided, however this is different from that notification of change of placement required under the Act.

Determination of manifestation of disability and appropriate placement: by group of persons knowledgeable about the student
No documentation of an IEP meeting to determine manifestation exists. The school social worker, 11 months after the fact, states in a memo (addressed to no one) that a meeting was held with Ms. F.C., H.S., an officer, the assistant principal and herself; however there is no documentation of notice of that meeting or a parental invitation to that meeting, nor documentation of meeting discussion and results. Records indicate the 9/19/95 IEP was reviewed with Ms. F.C. on 9/26/95, however there is nothing on that IEP relating to manifestation. That IEP does state that "H. has impulsive behaviors that are resulting in problems in school and community" and that "He does better when he is in a very structured setting with someone looking over him."

not by one individual
A 9/18/95 social history report by the school social worker states, "His behavior seems to be more delinquent in nature and again, not due to an emotional disorder. It is the opinion of the staffing team that H. understands cause and effect and consequences of specific behaviors. He chooses to behave in a way that has serious consequences in the community." However this report was done prior to the 9/19/95 staffing/IEP meeting and no manifestation meetings were held after the 9/9/95 incident and prior to this report. It is not possible, therefore, that the social worker could report on the opinion of the staffing/IEP team. This appears to be a unilateral determination. In fact, the IEP states that "H. has impulsive behaviors that are resulting in problems in school and community." The social worker's update was based on an interview with the mother and a review of records.

based on reevaluation
Reevaluation was done prior to the 9/19/95 triennial review. This included informal assessment by the special education teacher, speech-language specialist and the social worker. No assessment of psychological or cognitive functioning was done.

Written notice included:
manifestation determination and basis
explanation of procedural safeguards
including right to initiate due process hearing to challenge manifestation determination
No prior written notice was provided and therefore there was no explanation of procedural safeguards. Although Ms. F.C. was informed of her right to appeal the expulsion to the Board of Education, she was not informed of her right to appeal the change in placement under the Act.

Special education services continue during expulsion
The 10/3/95 letter of notification of expulsion does indicate that H. and his parent should contact the director of special education regarding academic support during the expulsion. The director states that the probation officer was informed that the District would provide the counseling services listed on the IEP upon notification of H.S.'s release.

III. CONCLUSIONS

The District did technically violate the provisions of the Act by failing to provide written notice of the proposed change in placement resulting from expulsion, failing to determine properly whether misconduct was a manifestation of H.S.'s disability and state the basis for that determination, failing to determine whether H.S. was receiving appropriate special education and related services and whether the misconduct was due to an inappropriate placement, and failing to provide an explanation of applicable procedural safeguards, specifically the right of Ms. F.C. to initiate an impartial due process hearing to challenge the manifestation determination and change in placement. The District appears to have not yet distinguished between those procedures required for expulsion and those procedures required for change in placement for a student with disabilities. Such violation, however, had no direct impact on the ability of H.S. to receive an appropriate education, as H.S. has been incarcerated since the incident, except for a brief time this summer, and has not been able to avail himself of services from the District.

The District did not fail to offer special education and related services during the period of disciplinary removal.

IV. REMEDIAL ACTIONS

On or before October 1, 1996, the District must provide to this office a written description of procedures utilized when considering expulsion of a student with disabilities. Such procedures must meet the requirements of the Act.

When H.S. returns to the District, the District must develop a new IEP. The IEP team must specifically address the issue of whether or not the previously determined service of counseling by the social worker 30 minutes per week is the current appropriate special education and related service to meet his needs. This determination must be based on reevaluation and with consideration of the previous determination that "H. has impulsive behaviors that are resulting in problems in school and community." and "He does better when he is in a very structured setting with someone looking over him." The District must also consider the information from Ms. F.C. which causes her to believe H.S. needs more counseling and/or special education services. A copy of that IEP must be forwarded to this office within one week of its development.

Dated this 6th day of September, 1996

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 96.515

Status: Complaint Decision

Key Topics:
Procedural Safeguards
Extended School Year
Free Appropriate Public Education
Related Services
Individual Educational Plan
Transitional Programming

Issues:

- Provision of assistive technology to student with autism, plus other modifications
- Holding triennial within 3 years
- ESY transition programming

Decision:

- By its own admission, District did fail to schedule timely triennial
- Not a clear violation of others; however manner and effectiveness clearly an issue

Discussion:

FEDERAL COMPLAINT NUMBER 96.515

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 11, 1996.

B. The complaint was filed by Ms. P.A. on behalf of her son P.A. , against the Fort Lupton RE-8 School District, Ms. Anita Salazar, Superintendent and Mr. Roger Piwowarski, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter was to have expired on December 10, 1996. This timeline was extended twice, however, to accommodate the complainant's request to present additional information, parental illness and winter break. The final timeline expires on January 15, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G P.A. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to provide the assistive technology listed on P.A.'s 11/29/95 IEP, specifically a computer system for communication and academics, within the regular and resource classes, comparable to his current equipment (Macintosh).

- failing to provide the middle school staff with information regarding autism so as to assist in working with P.A., as listed on the 11/95 IEP.

- failing to provide access for quiet space/room, as listed on the 11/95 IEP.

- failing to hold a triennial review within three years of the due date (due 9/95; held 11/96).

- failing to provide the ESY transition program components as listed on the 5/14/96 addendum to the 11/29/95 IEP, specifically:

    - facilitating P.A.'s spending time at the Middle School with teachers, paraprofessionals, and his brother at least 2 weeks prior to the start of the 1996/97 school year which was to have included at least an hour in both his special classroom and his regular classroom.

    - direct special services from the special education staff 5-10 hours per week one week before school starts.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.308, 300.340, 300.343, 300.344, 300.346, 300.534, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within its application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. P.A. was identified as a student with disabilities on an IEP dated 11/29/95. The primary disability was identified as physical due to autism, and the secondary disability was identified as speech/language.

5. Services listed on the 11/29/95 IEP included "Regular classroom instruction needs to be modified" and "Computer uses for communication". The following are checked as modifications to regular education: curriculum, instructional strategies, specialized equipment, method of presentation, environment and discipline. Although the IEP form states that if a type of modification is checked it should be described, no descriptions were given. Therefore, it is assumed that those modifications described in the "Needs" section of the IEP serve this purpose. Three of the 29 needs listed were:

#5. Computer system for communication and academics, within the regular and resource classes, comparable to his current equipment (MacIntosh).
#22. Provide Middle School staff with information regarding autism so as to assist in working with P.A..
#29. Provide access for quiet space/room.

6. Regarding computer system for communication and academics:

a. Ms. P.A., in her complaint, indicated the following:
She was told on August 19t that a MacIntosh computer had arrived and was to be available for P.A.'s use at the middle school. However, the special education provider has no knowledge of this computer, although she did receive the rolling cart that it was to go on.

b. The District states in its response to the complaint the following:
P.A. has had access to four computers for communication, academics, and skill development since his first day of school.

- One is a MacIntosh 5000 series located in the sever-needs-classroom on the first floor;
- a second is an Apple IIGS loaned to the school by the parents and located in the 5th-grade team room on the second floor, however allowing P.A. to use this was disruptive to other students and a distraction for him.
- a third is located in the technology education lab on the ground floor;
- and the fourth in the general education classroom.

P.A. was readily able to use all four computers and he consistently demonstrated his ability to use any of the machines for academics, communication, and computer skill development. Access was provided whenever P.A. required it, whenever staff determined that it was necessary and during at least three structured times each day.

The District also states that the PARA, 5th grade teacher and the resource teacher all report being able to understand P.A.'s speech at least 60% of the time since about the third week of school, and his communication with staff and peers was not compromised.

c. Ms. P.A. provided additional information which stated:

- The Mac (which can be used for communication) in the severe-needs-classroom has old administrative locked files on it and therefore is not working adequately with the "write out loud" program P.A. utilizes, including not allowing for updating and personalizing the "spoken" user dictionary. The district has not yet purchased the "write out aloud" software (this copy provided by parents). Until recently, that computer was only available in the severe-needs-classroom when not being used by other students.

- The old Apple GS donated by the parents and the Apple IIe do not have talking word processing capabilities and cannot be used for communication. Their use is limited to low level academics.
- The fourth computer is in a lab with 30 plus additional students, which is too visually and auditorally stimulating for P.A., and thus can't be utilized.
- Parents have received only one or two computer printouts of work that P.A. has done since school started, as compared to daily work in the previous year.
- Since P.A.'s speech is limited to generally one and two word utterances, the ability to understand those utterances 60% of the time is non-meaningful. The concern is the ability to communicate when needed. Parents believe P.A.'s access to communication with staff and peers has been compromised.

7. Re: information regarding autism:

a. Ms. P.A., in her complaint, indicated the following
To date, no inservices, conferences or other means of training has been made available to the middle school staff who will be working with P.A.

b. The District states in its response to the complaint the following:
- The resource teacher spent time reviewing portions of the record and talking to the elementary school staff and the end of the previous school year,
- The resource teacher reviewed the entire file within the first week of school,
- The PARA and resource teacher, during the first week of school, talked extensively with elementary school staff who had previously worked with P.A.,
- The resource teacher, PARA and 5th grade teacher attended the Autism Conference in mid-October.
- The PARA as spent over 15 hours reading and studying about autism.
- The resource teacher, PARA and 5th grade teacher have consulted with the psychologist (an in-house expert on working with autistic children), psychology intern, sever needs-cognitive teacher (also an in-house expert on working with autistic children) and the speech/language specialist.
- The resource teacher has previous experience working with children with autism.

c. Ms. P.A. disagrees with the District's perception that the psychologist and severe-needs-cognitive teacher are in-house experts on working with students with autism and believes the middle school staff to need more information about autism.

8. Re: access to a quiet room:

a. Ms. P.A., in her complaint, indicated the following
She was told that it will be next to impossible to provide a quiet room for P.A. to be able to use to take time out of the class setting when he has sensory overload.

b. The District states in its response to the complaint the following:
Quiet space has been available since the first day of school. Locations include the sever needs-cognitive classroom, the 5th grade resource room and the 5th grade regular classroom. Additional space was made available in the 5th grade team room on 9/18.

At times P.A. prefers the quiet space in the severe needs-cognitive classroom and communicates this preference to the PARA who responds quickly.

c. Ms. P.A. responds that the staff do not understand P.A.'s reactions to bright lights, noise, objectionable sounds or even smells and the need for a quiet room. The staff provided a nap time for P.A. (not listed as a need on the IEP nor done for other students) while his PARA went to lunch.

9. The Educational Service Plan dated 5/14/96 states that P.A. was to receive 5-10 hours of transition services to be provided by the special education staff one week before school starts, to end the first day of school. These services were to be provided every day for approximately 1 to 2 hours per day.

a. Ms. P.A., in her complaint, states that :

-. she understood ESY-transition services were to have begun on 8/19.

-. no one from the middle school contacted her and that she was not able to make contact with them.

-. The paraprofessional ("PARA") met with P.A. in his home on 8/16/96 for one hour, and walked around school with him for 30 minutes each day on 8/19 and 8/20.

-. That the first day for staff was 8/22 and they did see P.A. during their afternoon planning time.

-. The classrooms were locked most of the time and there was no computer set up for him to work with or any other activities available.

-. There was no certified staff assigned the ESY-transitions services agreed upon.

b. The District in its response to the complaint, states that the terms of transition service were state loosely to account for the as yet undetermined school calendar and the exact nature of the activities was not spelled out. (The transition plan dated 2/1/96 was a temporary plan, and not part of the IEP.) Therefore the following services were provided voluntarily by staff.:

- P.A. visited the school on 8/19, 20 and 23 for a total of 3.5 hours.
- The PARA visited P.A.'s home and accompanied him at school for a total time of 4.5 hours.
- Ms. Tadehara [position not stated] visited P.A. at home for about 4.3 hours.
- The resource teacher spent 2.5 hours with P.A. on 8/23

This totaled about 11.3 hours in transition services for P.A., delivered both at home and on the school grounds. All services by staff members were voluntary and were on unpaid time.

c. Ms. P.A. responded that it is clear that all that was done was on personal time, done informally rather than based on the IEP, and did not meet the requirements of the IEP. The visit from Ms. Tadehara was at the request of Ms. Tadehara related to a university class project and had nothing to do with the IEP delineated transition services. Visits to school consisted of walking through the halls and looking at closed doors.

10. The 5/10/95 IEP resulting from an annual review states that the date of the next triennial is to be 9/95 and the date of the next IEP meeting is to be 5/96. A triennial review was held for P.A. during 11/95, as indicated by an IEP dated 11/15 and 11/29/95.

a. Ms. P.A., alleged that the triennial review was not held on time.

b. The District, in its response to the complaint, states that the initial placement meeting was held on 10/14/92. Therefore the triennial was held within 3 years, one month and one day of the initial placement. The District states this was due to scheduling difficulties, but was completed within a reasonable time period.

c. Ms. P.A. provided additional information and suggested this lateness was symptomatic of the way things are done or not done in the District for students with disabilities.

11. The law is clear that services listed on student's IEPs must be provided and they must be listed in such a manner that the commitment of resources and the manner in which they will be delivered is clear to all who are involved in both the development and implementation of the IEP. Specific services were listed on the IEPs of P.A. The complainant and the District present divergent perceptions relative to the amount, quality and purpose of the services which were to have been provided and which were provided. The process of complaint resolution does not allow for taking testimony under oath and for determining credibility. Therefore, this complaints investigator is only able to determine that there is no common understanding of what was to be provided and what is being provided.

12. This investigator contacted the supervisor for significant support needs in the special education unit at CDE, who visited P.A.'s program, to see if she could provide positive information that would assist in the resolution of this complaint. She had specifically observed the educational program for P.A. at the request of the director of special education, with no responsibilities relative to this complaint. She was able to contribute the following information which may assist in the resolution of the issues addressed in this complaint.

- Staff are really trying to meet the needs of P.A. and all have a caring attitude toward him, especially the PARA.

- P.A. lacks a communication system to use on an ongoing basis. This creates a void relative to interactions with peers. P.A. was incredibly isolated from other students and there was little facilitation of interaction with peers.

- One of P.A.'s teachers and case manager has no experience in working with students with significant support needs and doesn't understand how to define learning outcomes. She is not providing instructional support to the PARA, who is making the instructional decisions on her own. Another teacher also has little background in providing inclusive education for students with significant support needs and has no understanding of learner outcomes. She does not supervise or monitor the PARA in the current learning environments. The classroom teacher is very willing to learn but needs more support from the special education teachers .

- There is no team planning and no understanding of environmental assessment.

- Responses to P.A.'s behavior are very inconsistent and a written behavior plan is needed

III. CONCLUSIONS

1. Although the District has not clearly violated the provisions of the Act by failing to provide a computer system, failing to provide the middle school staff with information regarding autism and failing to provide access for quiet space, the manner in which this has been done and the effectiveness of that manner are in question.

2. By its own admission, the District did, technically, violate the provisions of the Act by failing to hold a triennial review within three years of the due date. The effect of this being held approximately six weeks does not, however, suggest that the District failed to provide a FAPE to P.A.

3. The District did, technically, violate the provisions of the Act by failing to provide the ESY transition program components as listed on the 5/14/96 addendum to the 11/29/95 IEP, specifically by facilitating P.A.'s spending time at the Middle School with teachers, paraprofessionals, and his brother at least 2 weeks prior to the start of the 1996/97 school year which was to have included at least an hour in both his special classroom and his regular classroom and by failing to provide direct special services from the special education staff for 5 - 10 hours during the week before school started. Some voluntary meetings and visitations were held, but all were on the personal time of staff and not provided by the District commensurate with the IEP. The manner in which this was done and the effectiveness of these volunteer services is in question.

4. It is clear that P.A. needs an effective service plan for the development and use of a communication system, a behavior plan, and a plan for environmental assessment and the provision of instructional services in a coordinated manner. Instructional decisions need to be made as a team, and not by the PARA, alone.

IV. REMEDIAL ACTIONS

1. On or before March 1, 1997, the District must seek consultation from the Significant Support Needs Staff at CDE to provide a one day evaluation of P.A.'s program and any necessary subsequent technical assistance.

2. On or before March 15, 1997, the District must have in place: an assistive technology plan that addresses P.A.'s communication system, a behavior plan, and a plan for the provision of instructional services in a coordinated manner. Such plans must be part of P.A.'s IEP and must include the commitment of resources and the manner in which services will be delivered. A copy of these plans must be forwarded to this office no later than one week after development.

Dated this _____ day of January, 1997,

____

Carol Amon, Federal Complaints Investigator

Case Number: 96.516

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Related Services
Individual Educational Plan
Compensatory Services

Issues:

- Provision of services at the beginning of school year

Decision:

- Failure to provide 8 days of service; but did not constitute failure to provide FAPE; compensatory services denied

Discussion:

FEDERAL COMPLAINT NUMBER 96.516

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 29, 1996.

B. The complaint was filed by Ms. M.W.-S., on behalf of her son P.S. , against the Denver Public Schools, Mr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires on December 30, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G P.S. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to provide P.S. a FAPE by not providing special education and related services to him from the beginning of the 1996-67 school year to the present

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. P.S. was identified as a student with multiple disabilities on an individualized education plan ("IEP") Annual Review dated 10/4/95. Services to be provided from 10/4/95 through 10/4/96, according to that IEP were:

   Special Education Instructional Services in a self contained classroom 360 minutes per day, 5 days a week and

   Related Services by a Speech/Language Specialist, 45 minutes per day, 1 day a week for the same period.

   Transportation as a related service was not indicated.

   The IEP also states that P.S. will need to be transitioned to high school and that Ms. M.W.-S. would try to visit Thomas Jefferson and Abraham Lincoln High Schools' self-contained classes to presumably choose between the two. These were the two choices provided by the District, as there is no center-based program providing self-contained classes at Montbello High School, near where P.S. resides.

   No Extended School Year ("ESY") services were identified due to summer vacation being preferred by the family.

5. An Addendum to the above referenced IEP dated 10/2/96, indicates a meeting was held due to transportation safety concerns related to behaviors and the distance for P.S. to travel from home to Thomas Jefferson High School ("TJHS"). Documentation on the Addendum indicates that, although an annual/triennial review was to have been held by 10/4/96, it was not, due to several persons not being at school and the need to deal with other concerns immediately. The review was postponed until it was appropriate to complete.

Regarding services from 8/28/96 to 10/2/96:

6. According to the complainant, although she received notification that P.S.'s placement was at TJHS and notification of transportation arrangements, she did not take advantage of those arrangements beginning 8/28/96, but rather took P.S. to school

for the first time on 9/3/96 to ease with the transition. At that time, according to Ms. M.W.-S, she was asked by the teacher in P.S.'s class to not send him yet. As per the teacher's request, she did not send him to school and spent the next month playing phone tag with the area manager regarding this issue. The 10/2/96 meeting was subsequently held.

7. Documentation is on file in the form of a letter from the complainant to "all of whom it may concern at DPS", stating that she is not in agreement with the transportation schedule due to the length of the bus ride, the need for a harness, and P.S.'s behaviors which may result in harm to himself or others.

8. According to an affidavit from an advocate for Ms. M.W.-S., the 10/2/96 meeting was held because Ms. M.W.-S. had been informed that TJHS was unprepared to meet P.S.'s needs, the staff would be unable to guarantee the safety of P.S., staff and other students; and that adequate personnel had not yet been hired to address the needs of P.S. as addressed in his IEP. According to a letter to the Director of Special Education from the advocate dated 10/8/96, P.S. did not attend school at TJHS due to the lack of inappropriate supports at the school.

9. In its response to this complaint, the District indicates the following:

   a. Ms. M.W.-S. received notice dated 5/10/96 of placement for P.S. at TJHS and that he would receive curb to curb transportation.

   b. Ms. M.W.-S. received transportation information dated 8/12/96 indicating bus numbers and pick-up/drop-off times. It also indicated the first day of school would be 8/28/96.

   c. P.S.'s student records were forwarded to TJHS from Morey Middle School in August, and the special educator reviewed those records prior to the first day of school.

   d. The bus stopped at the home of P.S. on 8/28/96 and every day for the first two weeks of school, but P.S. did not board the bus. The parent did not cancel transportation and P.S.'s name and address still appear on the transportation routing. The bus driver no longer stopped after the first two weeks of school.

   e. Ms. M.W.-S. visited TJHS in May, 1996 and spoke to the special education teacher. At that time Ms. M.W.-S expressed her belief that there was not enough paraprofessional support assigned to the classroom and therefore P.S.'s needs could not be met there.

   f. Ms. M.W.-S. and P.S. visited TJHS on 9/3/96 and one subsequent day that month for about 30 - 45 minutes each visit. At that time Ms. M.W.-S. reported to the special education teacher:

      - that P.S.'s behavior patterns had deteriorated over the summer, that he was growing increasingly aggressive towards others and that she had been pushed down the stairs and kicked by him, and that she believed he might be a threat to the safety of students, teachers, and paraprofessionals at the school,

- that P.S. was being evaluated at the JFK Center and that she did not want to make a decision regarding his education until all the results had been compiled,

- that she was having difficulty in getting her son to ride in a car or other type of transportation and that she had a hard time getting him to leave the car each morning.

The teacher's impression was that the program recommendations were appropriate, and that neither P.S.'s cognitive or behavioral needs were outside of the norm for the students assigned to her program. She encouraged the parent to complete the registration information on each of the two occasions and the teacher asked how she could be supportive to the parent. At no time did personnel at TJHS request or suggest that P.S. not attend school.

g. Ms. M.W.-S. contacted the Special Education Coordinator on 9/13/96 to request an IEP meeting. The coordinator referred her to TJHS for this request, and at that time Ms. M.W.-S. informed the coordinator that she had not enrolled P.S. at TJHS because of an escalation of aggressive behaviors towards others and himself. She also indicated that she was having him evaluated at JFK Center and did not want him in school until that assessment was completed.

10. The law is clear that the District must provide those services listed on the IEP, in this case:

Special Education Instructional Services in a self contained classroom 360 minutes per day, 5 days a week and

Related Services by a Speech/Language Specialist, 45 minutes per day, 1 day a week for the same period.

Both the complainant and the District agree that those services were offered by the district, to be provided at TJHS, and that transportation was offered. The complainant and District strongly disagree as to why those services were not utilized, the complainant stating that she was told by the teacher not to bring P.S. to school yet, and the District stating that the complainant did not want to bring P.S. to school due to her concerns about safety. Documentation shows the complainant was not in agreement with the transportation arrangements. A letter from the complainant's advocate indicates P.S. did not attend school due to the lack of appropriate supports at school. An affidavit from the advocate states that TJHS was unprepared to meet P.S.'s needs, that staff would be unable to guarantee the safety of P.S. and others, and that adequate personnel had not yet been hired to address his needs.

Regarding Services from 10/2/96 to present:

11. An Addendum dated 10/2/96, indicates the following services are to be provided: No date of initiation nor anticipated duration were recorded.

Homebound schooling until educational programming at Montbello H.S. could be put into place which would take approximately one month, Creation of program for P.S. at Montbello H.S. to include full day (6 hr.) programming (vocational and community), one-on-one adult assistance (presumably a paraprofessional ["PARA"]),

Referral to the behavioral specialist for consultation,

Transition from homebound schooling to school programming with help of a private service provider and a trained one-on-one adult (PARA),

Support with eating, and

Support with communication issues between teacher, PARA, mother and P.S.

12. The complainant states that she is not in agreement with the temporary homebound services, that P.S. needs a full six hour day; but that this cannot be provided due to the District's lack of appropriate personnel. She states that homebound education for two hours per day was begun on 10/16/96.

13. The complainant's advocate states that the 10/2/96 meeting was inconclusive in that no placement was determined, no immediate programming was determined, and no transportation was put in place. She states in an affidavit that that the IEP team did determine that TJHS was not an appropriate placement based on the amount of travel time from home to school. She reported that the District's Coordinator stated she would talk with the rest of the team to determine if Montbello would be able to serve P.S. despite the fact that there is only a "mild-moderate" program at that location.

14. The District, in its response to the complaint, states at the 10/2/96 meeting the IEP teamed determined that:

    a. the 10/4/95 IEP no longer accurately reflects P.S.'s needs, appropriate services, educational setting, goals or objectives,

    b. Ms. M.W.-S. was to complete an application for home bound services and for behavior consultation, and officially register P.S. at TJHS,

    c. the Special Education Coordinator would arrange for these services while the parent completed the applications,

    d. when P.S. is ready to transition from homebound services to school services, a paraprofessional will work with the homebound teacher and continue to provide one-on-one support in a classroom/school setting, and that the eventual educational setting would be located in a school closer to home.

15. Documentation provided by the District indicates the following:

    a. An application for homebound teaching for P.S. was signed by Ms. M.W.-S. on 10/16/96 and approved by the Director of Special Education on 10/31/96. The homebound teaching was to occur from six to eight weeks and

    b. A Homebound Services Plan was completed on 11/14/96 and revised on 11/19/96.

17. The District, in its response to the complaint indicates that P.S. has been receiving homebound instruction for two hours per day, five days a week beginning 10/15/96

(for a total of 54 hours as of 11/26/96) and that the behavior management specialist has spent 18 hours and 38 minutes in the home both collaborating with the parent and the homebound teacher. The District states that neither the parent, teacher or behavior management specialist have expressed that P.S. is well enough, or is ready, to transition to school. The District states it will continue to provide the amount of special education services that P.S. is able to tolerate and that the goal is to return him to a school/classroom situation as soon as appropriate. The District also gave numerous examples of progress made.

18. The law is clear that a student with disabilities must be a FAPE which is determined by an IEP team and documented on an IEP. IEPs must be reviewed at least annually and must contain current levels of functioning, needs, goals, short term objectives, special education and related services to be provided, dates of initiation and duration of services and recommended placement in the least restrictive environment.

    a. P.S. had an IEP in place until 10/4/96 until which time it was to have been reviewed. It was not reviewed, but rather an addendum was added to the previous IEP. Such addendum was not clear and did not contain all elements of an IEP. This lack of clarification resulted in differing perceptions by the District, the complainant and her advocate of what services were to be provided. Should those services have been clear, and the parent not agree with those services, she could have exercised her right to appeal by requesting a due process hearing.

    b. No services were provided to P.S. from 10/3/96 until 10/15/96, a total of 8 school days. Services were provided beginning 10/15/96 commensurate with the addendum and subsequent homebound service plans developed on 11/5 and 11/14.

III. CONCLUSIONS

1. No special education and related services were provided to P.S. from August 28, 1996 to October 15, 1996. However, the District's and the complainant's perceptions of why they were not provided are quite disparate; the complainant blaming the District and the District blaming the parent. The process of complaint resolution, however, does allow for taking testimony under oath for determining credibility and this complaint investigator cannot make a judgment as to which perceptions are correct. Documentation does show that the District offered to provide those services consistent with the 10/4/95 IEP, as well as transportation. Based on that documentation, the District did not violate the provisions of the Act by failing to offer/provide special education and related services to P.S. from 8/24/96 to 10/2/96.

2. The District did violate the provisions of the Act by failing to review the IEP, at least annually, by not reviewing the IEP of P.S. by 10/4/97. The 10/2/96 addendum to the previous IEP did not meet the requirements of an annual review nor did it contain all the elements of an IEP.

3. Although the District did not provide services from 10/3/96 to 10/15/96, non-provision of services for eight days would not constitute a failure to provide a FAPE.

4. Although there is no IEP in effect to delineate services to be provided from 10/15/96 to the present, those services appear to be consistent with the addendum and the homebound service plans.

5. Compensatory services requested by the complainant are denied.

IV. REMEDIAL ACTIONS

On or before January 17, 1997, the District must hold a meeting to complete an IEP for P.S. That IEP must contain all the items required by law. Should a triennial review be necessary, this timeline may be extended to January 31, 1997 to allow time for assessment. A copy of that IEP must be forwarded to this office no later than one week after its completion. Should the parent/complainant not agree with the decision of that IEP team, she may exercise her right to appeal by requesting a due process hearing.

Dated this _____ day of December, 1996

____

Carol Amon, Federal Complaints Investigator

Case Number: 96.517

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education

Issues:

- Provision of paraprofessional support 100% of time

Decision:

- Having no response to complaint by District, must conclude by default, a violation occurred.

Discussion:

- District was in negotiation with parent, but failed to respond.

FEDERAL COMPLAINT NUMBER 96.517

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on November 1, 1996.

B. The complaint was filed by Mr. M.L. and Ms. P.L. on behalf of their daughter L.L. , against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent and Dr. Joe Hendrickson, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires on December 31, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. L.L. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to provide special education paraprofessional support to [redacted] in regular education classes 100% of the time from the beginning of the 1996-67 school year to present.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

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34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. L.L. was identified as a student with multiple disabilities as documented by individual education plans ("IEPs") dated 10/18/94 and 11/21/95.

5. The complainants allege that L.L.'s current IEP states that she will have 100% aide time and that she does not and has not, all year since school has started. The remedy they request is compliance with the IEP.

6. The District was notified of this complaint on 11/12/96 and given an opportunity to respond to this complaint, but failed to do so. It was requested that the District provide this office with a copy of all IEPs related to the 1995 school year, but failed to do so. The District Director of Special Education indicated in a telephone conversation that this matter had been resolved.

7. Subsequently, this complaint investigator left a message for the complainants asking if this had been resolved and inquiring as to whether they wished to withdraw the complaint. A memorandum from the complainants dated 11/13/96 stated that the complaint was not resolved, as L.L. still does not have the aide time as stated in her IEP. They indicated that they felt the Director of Special Education was working hard to help resolve this issue and they felt confident they could work through this with him. They suggested they needed more time and may withdraw the complaint by Thanksgiving. The complaint was not withdrawn.

8. This complaints investigator left a message with the special education secretary, telling the Director of Special Education that this matter was not withdrawn and that a response to the complaint was needed. No response was ever received.

9. The law is clear in that those services listed on a student's IEP must be provided. A copy of the current IEP for L.L. was not provided by the complainants of the District so it is not clear what specific service was to be provided. A review of an IEP dated 11/21/95, on file at CDE from a previous complaint, states that a characteristic of service is "special education paraprofessional 100% support in regular education class".

III. CONCLUSIONS

Having no response by the District on this matter, it must be concluded by default that the District did violate the Act by failing to provide special education paraprofessional support to L.L. in regular education classes 100% of the time from the beginning of the 1996-67 school year to the present.

IV. REMEDIAL ACTIONS

On or before January 10, 1997, the District must provide to this office documentation that paraprofessional support to L.L. is currently being provided 100% of the time in regular education and must also provide assurance that this support will continue for the remainder of the school year so long as such support is determined to be appropriate by the IEP team.

Dated this _____ day of December, 1996

Carol Amon, Federal Complaints Investigator

Case Number: 96.519

Status: Complaint Decision

Key Topics:

Free Appropriate Public Education
Related Services
Individual Educational Plan

Issues:

- Identification of goals and objectives
- Amount of time of service provision

Decision:

- Goals identified, but poorly written
- Services were provided
- Only technical information altered on IEP

Discussion:

FEDERAL COMPLAINT NUMBER 96.519

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on December 16, 1996.

B. The complaint was filed by Ms. D.P. and Mr. B.P. on behalf of their son, J.L.P. , against the Denver Public Schools, Mr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires on February 14, 1996.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G J.L.P. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to identify goals and objectives on the IEP dated 11/18/96 and
- failing to provide those services listed on the 11/18/96 IEP, specifically:
  - 15 minutes per week of speech/language consultation in the ISIS setting,
  - 60 minutes per week of direct instructional services by the EMH teacher in the ISIS setting, and
  - 30 minutes per week of OT/PT services in the resource setting.

Subsequent to the complainants' filing of this complaint, they have alleged that the special education teacher has tampered with and/or altered official school records relative to this complaint.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.L.P. was identified as a student with multiple disabilities (educable mental disability, physical disability and speech/language disability) on an individualized education plan ("IEP") dated 11/18/96.

   a. Documentation of the IEP indicates the following five annual goals were included:
      ...improve communicative skills
      ...improve social interactions
      ...improve writing, reading and math
      ...improve visual motor skills
      ...improve gross motor skills

   b. Documentation of the IEP (page 3)indicates the following services were t be provided beginning 11/96 and ending 9/97:
      ...consultive speech/language in the ISIS setting by the speech language specialist, 15 minutes per day, one day per week,
      ...special instructional services in the ISIS setting by the EMH teacher, 20 minutes per day, three days per week and
      ...services for the physically disabled in a resource setting by an OT or PT, 30 minutes per day, one day per week.

   c. Another copy of Page 3 of the IEP dated 11/18/96, provided by the District, states the same services as listed above, however speech language service is increased to 30 minutes per day, one time per week and general education services are added for 158 minutes per day, five days per week.

d. An addendum to page 3 of the IEP dated 12/20/96 indicates the following services which is a change from the above, services to begin on 1/6/97 and end on 5/30/97:

...consultive speech/language services 15 minutes per day, one day per week,
...direct speech/language services in the ISIS setting, 30 minutes per day, one day per week,
...special instructional services by a learning disabilities teacher in an ISIS setting, 30 minutes per day, five days per week and
...services in a resource setting of an occupational/physical therapist, 30 minutes per day, one day per week to begin 11/18/96 and end 5/30/97.

District staff, when interviewed, indicated that this addendum was prepared as a result of the IEP team meeting to review services and that the parent was a part of these decisions.

e. Documentation by the District indicates that five pages of short term objectives relating to the annual goals, were written as follows:

11/18/96 - 5 typed objectives toward the goal "improve communicative skills" with the beginning date of 11/96 and target completion 1/97.

12/20/96 - 2 hand written objectives toward the goal "improve communicative skills" with the beginning date 12/96 and the target completion date 3/97. (These two objectives are identical to the first two objective typed above.)

11/18/96 - one objective toward the goal "improve social skills" with the beginning date 11/96 and the target completion date 3/97

11/18/96 - 4 objectives toward the goal "improve writing, reading, math readiness skills" beginning date 11/96 and target completion date 3/97. The first objective was eliminated on 12/20/96 and replace with a new one.

11/18/96 - 4 objectives toward the goal "improve gross and fine motor skills for increased classroom and school participation" beginning 11/18/96 and target completion date 2/97.

5. The complainants allege that none of the above services were provided to J.L.P., that the special educator refused to serve him in the regular classroom, that no goals or objectives were written and that no coordination of regular and special education was provide to assure a FAPE. They are requesting compensatory services for those not provided.

6. The District, in its response to the complaint, provided the following documentation of services provided to J.L.P. The District believes these services were in accordance with, and in excess of, the requirements of the IEP.

Speech/language Specialist Log:
September 9,16,23,30, October 7,11,21,28, November 4,18,22,25, December 2,9,16, January 6

Special Educator (M.A.O.) Log:
September (12 entries), October (15 entries), November (10 entries)
Special Educator (K.H. - substitute) Log:
December (15 entries), January (8 eight entries to date)

Occupational Therapist Log:
September - January (13 entries ranging from 40 minutes to 60 minutes)

A review of these logs and summaries of service indicates services were provided in accordance with the IEP and in some cases, in excess of the IEP.

7. The complainants, subsequent to filing the complaint, have alleged the following relative to "tampering with and or altering official school documents":

   a. Notice of re-assessment form
   The legal name of J.L.P. was changed from J.L.P. to L.P.
   Mrs. P. was changed to Mr. and Mrs. P.
   Date was changed from 8/29/96 to 8/26/96
   Signature or original was written once, but twice on second form

   b. IEP goal #3 and short term objectives
   Short term objectives for this goal were written on 12/20/96, but date was changed to 11/18/96

   c. Notice (11/4/96) of IEP meeting to be held on 11/18/96:
   Original was typed and signed by the principal and J.L.P.'s legal name was correct; another was handwritten by special education teacher, and students legal name was wrong.

7. The law is clear in that statements of specific targeted annual goals and short term objectives must be written at the IEP meeting and prior to placement or providing services to a student. The goals should be statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period. Short term instructional objectives must be written by an IEP team and may not be changed without notifying parents and initiating a review of the IEP. It is also clear that special education and related services written on an IEP must be provided.

8. A review of the documentation provided by both the complainant and the District indicates the following:

   a. Annual goals were written as part of the IEP dated 11/18/97, however they were very poorly written. "J.L.P. will improve communicative, ...social interactions, ...reading and math, ...visual motor skills and ...gross motor skills" These are not statements that describe what J.L.P. can reasonably be expected to accomplish within a twelve month period. They simply identify areas in which J.L.P. might improve.

   b. Short term instructional objectives do not appear to have been written by the IEP team prior to placement. They appear to have been written by individual service providers at various times.

c. Notices for assessment and meetings were provided by more than one person and on different dates. The reason for this cannot be explained. The complainants allege this is willful tampering and altering of records; the District responds that a teacher may have been making certain that all documentation was correct, on file and within timelines. Even if the complainants' allegations are correct and the teacher was "covering her tracks", this does not appear to have affected the services being provided to J.L.P.

9. A review of the documentation and an analysis of the information provided by the complainants and District staff does not support the allegation that services have not been provided. The complainants state they have not; District records demonstrate they have, and interviews with District staff suggest that they have. The Complaint Process is not a process in which testimony can be taken under oath and a judgment made on the credibility of that testimony. The Complaint Process relies heavily upon documentation; and, in this case, there is documentation that services were provided.

III. CONCLUSIONS

1. The District did not violate the provisions of the Act by failing to identify goals and objectives on the IEP dated 11/18/96, prior to placement; however the goals were very poorly written and the objectives may not have been written until the IEP was continued and reviewed on 12/20/96.

2. The District did not violate the provisions of the Act by failing to provide those services listed on the 11/18/96 IEP and revised on the 12/20/96 IEP.

3. The District may have altered technical information on the Notice of Assessment and Notice of Meeting forms and may have changed the date some short term objectives were written, but such changes (although reprehensible) do not constitute a violation of the provisions of the Act nor did they affect the provision of a FAPE.

IV. REMEDIAL ACTIONS

At the regularly scheduled time of the next annual review for J.L.P. or at the time a review is help upon request, the district must develop an IEP which includes targeted annual goals and specific short term instructional objectives. Such IEP must be developed by the team at the time of the meeting and not by individual team members at another date or time. A copy of that IEP must be forwarded to this office no later than two weeks after its development.

Dated this _____ day of February, 1997

Carol Amon, Federal Complaints Investigator

Case Number: 96. 520

Status: Complaint Decision

Key Topics: Student Evaluation
Eligibility

Issues:
- Appropriate criteria in determination of eligibility

Decision:
- No clear determination, based on documentation

Discussion:
- Lack of distinction between IEP and 504 plan

FEDERAL COMPLAINT NUMBER 96.520

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on December 12, 1996.

B. The complaint was filed by Mr. M.S. and Ms. J.S. on behalf of their daughter, S.S. , against Aurora Public Schools, Dr. David Hartenbach, Superintendent, Dr. David Wood, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires February 10, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G S.S. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to use appropriate criteria in the determination of disability and eligibility for special education on 10/11/94 and 1/19/95.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.17, 300.121, 300.130, 300.180, 300.220, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within its application.
3. Two of the assurances made by the District are that in accordance with the Act, it will (1) identify, locate and evaluate all children residing within its jurisdiction who have disabilities and who are in need of special education and related services and (2) provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. A special education referral was made by Mr. and Mrs. S. and parent permission for assessment was signed on 10/11/94.
5. The following assessments were documented: health, physical and social functioning - 10/11/94, physical/health functioning - 10/24/94, communicative functioning - 7/29/93 (district accepted independent assessment results), and educational functioning - 10/12/94.
6. Parents were notified in writing on 10/11/94 of a staffing (eligibility and initial IEP meeting) to be held on 10/26/94.
7. No information was submitted by the complainants or the district as to whether or not this meeting occurred, however records indicated parents were notified in writing on 12/15/94 of another staffing (eligibility and initial IEP meeting) to be held on 1/4/95.
8. An initial individualized education plan ("IEP") was developed on 1/4/95. Documentation on that plan states: "Are the students difficulties in school caused by a disability?" Answer: "Yes". If yes, identify the disability: "physical handicap (7)". The program/service plan states "504 plan recommended". Regarding participation in regular education, the plan states that regular classes unassisted will be provided for all subjects with 504 plan strategies implemented. Goals and objectives were not included in the IEP. Parent signature indicates involvement in the development of this IEP and permission for the recommended placement/services to be given.
9. A Section 504 referral was made on 1/19/95, signed by both the parents and the principal.

10. Permission for initial assessment was again requested on 10/15/96 and signed by Ms. J.S. on 10/16/96. The reason for such assessment states "old IEP is out-dated. We need to re-test."

11. Assessments were completed and notification of a staffing to be held on 11/12/96 was sent to the parents on 11/3/96. The purpose of the staffing was an initial meeting to determine eligibility for special education.

12. Another initial IEP was developed on 11/12/96. Documentation on that plan states: "Are the students difficulties in school caused by a disability?" Answer: "Yes". If yes, identify the disability: "significant emotional handicap (3) and physical handicap (7) secondary to Tourettes and ADHD". The program/service plan states "cross-categorical language arts, reading, social studies and math to meet affective/behavioral needs 15 - 18 hours per week." Regarding participation in regular education, the plan states that the student will participate in no assisted regular classes and in 15 hours per week of unassisted regular classes to include science and exploratories. Goals and objectives were included in the IEP. (Note: A District representative explained by telephone that "cross categorical" means special education instructional services provided by special education teachers.)

13. The complainants allege that the District determined that S.S. met the eligibility requirements for special education and related services during the 1/4/95 meeting, but refused to provide such services and instead made a referral for a Section 504 plan. The complainants then allege that in the following November, the District discovered an error had been made and that S.S. should have been in special education all of this time.

14. The District's response indicates that although the IEP team agreed that the student's difficulties in school were caused by a disability, this did not justify a special education placement, but rather a section 504 referral.

15. Both the complainants and the District suggest that the desire of the parents is placement into a day treatment program.

16. The law is clear that: once a special education referral has been made and assessment completed, a meeting must be held to determine if the child has a disability and if the child is eligible for special education. If so, an IEP must be developed within 45 school days of the date of the special education referral. In order to be eligible for special education and related services under the Act, the student must have a disability and that disability must prevent the child from receiving reasonable benefit from regular education alone. Criteria for a disability preventing the child from receiving reasonable education benefit from regular education is defined in the Rules for the Administration of the Exceptional Children's Educational Act, 22 CRS 2220-R-2.00 Definitions and Criteria. If the student is eligible, an IEP must be developed and implemented, and reviewed within one year. The IEP must contain statements of the child's current level of functioning, needs, goals, objectives and specific special education and related services and amount of service, as well as a recommendation as to where the services will be provided, the extend of participation in regular education, projected dates for initiation and anticipated duration of services, and rationale for providing services outside of the regular classroom.

17. The following is an analysis of the District's procedures relative to the 10/94 special education referral.

a. Special education referral: 10/11/94
Development of IEP: 1/4/95
Considering Thanksgiving and Winter breaks, the IEP was developed within approximately 45 school days of the special education referral.

b. Eligibility documentation on IEP:

Did S.S. have a physical disability: a sustained illness or disabling physical condition?

The IEP states the child did have a physical disability (Tourette's syndrome and ADD were mentioned in current level of functioning)

Did S.S.'s physical disability prevent her from receiving reasonable educational benefit from regular education?

S.S.'s IEP states that the students difficulties in school are caused by a disability. Because there is no other section of this IEP that addresses preventing her from receiving reasonable educational benefit from regular education, it must be assumed that the districts' statement that her difficulties in school are caused by a disability, supplies this information.

According to documentation provided by the District, the District determined that S.S. had a disability and that the disability prevented her from receiving reasonable educational benefit from regular education. These two determinations result in S.S.'s having met eligibility requirements for special education and related services under the Act.

According to District representatives, this is strictly a documentation error. They state that it was determined that S.S. had a disability, but that the disability did not prevent her from receiving reasonable educational benefit and that is why she was referred for a Section 504 accommodations.

c. IEP developed:

A three page IEP was developed and approved by the parents. It included current levels of functioning, needs and determination of disability. It did not include goals, objectives, statements of special education services to be provided, dates of initiation of service and duration of service. Instead, recommended a 504 service plan.

According to District representatives, this, again, is strictly a documentation error. The District representative stated that the IEP form was utilized for convenience, but that this was not an IEP, as she did not meet eligibility requirements.

d. IEP implemented, and reviewed within a year.

S.S. was referred for a 504 service plan and these services were not monitored or reviewed as part of the IEP process. On 10/15/96 (21 months later) the District indicated that the old IEP is out-dated and that they needed to retest and redetermine eligibility. That was done and S.S. was determined to be eligible for special education and related services.

18. The following is an analysis of the District's procedures relative to the 11/96 IEP.

b. Eligibility documentation on IEP:

Did S.S. have a disability?

The IEP states the child did have a significant emotional handicap and a physical handicap. The physical handicap was based on Tourettes and ADHD.

Did S.S.'s disability prevented her from receiving reasonable educational benefit from regular education?

S.S.'s IEP states that the students difficulties in school are caused by a disability. Because there is no section of this IEP that addresses preventing her from receiving reasonable educational benefit from regular education, it must be assumed that the districts' statement that her difficulties in school are caused by a disability, supplies this information.

According to documentation, the District determined that S.S. had a disability and that the disability prevented her from receiving reasonable educational benefit from regular education. These two determinations result in S.S. having met eligibility requirements for special education and related services under the Act.

(Note: The answers to these two questions were both "yes", just as they were both answered "yes" during the 1/95 eligibility determination. There is no difference in the process for documentation between 1/95 and 11/96. The District, again, states there was a definite difference and that this is a documentation error, not a procedural error.)

c. IEP developed:

A six page IEP was developed and approved by the parents. It included current levels of functioning, needs, determination of disability, goals, objectives, specific special education services to be provided, dates of initiation of service and duration of service.

d. Placement:

There is no indication of what alternative placements were considered when the IEP team recommended placement in the least restrictive environment. According to a telephone conversation with Mr. M.S., placement into a day treatment center was not considered because the District's policy is to place the child into the less restrictive settings first. The District would then observe progress and would not place the child into a day treatment program until all interim steps on the continuum had been tried.

The District's representative indicated that District would not recommend placement into a day treatment program until the interim steps (full time in a cross-categorical program, full time in a special class, full time in a special class in another building and a middle school alternative center) had been exhausted.

19. Recent telephone conversations with both the District and the complainants indicate the S.S. is currently receiving services at Metro Children's' Center, a day treatment facility operated by Mental Health. This placement was agreed upon by the family and Mental Health with the District's agreement to provide courtesy transportation. Although Metro Children's' Center will receive the per pupil operating revenue (PPOR, the District is not paying excess costs, since is does not agree entirely with this placement. The

District believes it needs to exhaust all lesser restrictive placements prior to such a determination.

III. CONCLUSIONS

Documentation provided by the District clearly does not reflect what the District believes it to have done. While the District determined on 1/4/95 that S.S. was ineligible for special education under the Act, it's documentation indicates that she was eligible and was entitled to special education and related services. Special education and related services were not identified, but rather a referral for a Section 504 plan was made. Parents did agree to this however.

The District believes S.S. is now eligible for special education and related services and documentation reflects this. A service plan was developed and the District placed the child. Although both the parents and the districts agree that the parents were seeking placement into a day treatment program for S.S., the IEP reflects no consideration of this alternative.

The District did, technically, violate the provisions of the Act by not clearly determining and documenting eligibility for special education and related services in January, 1995. The parents did agree to a Section 504 service plan, however, and may exercise their right to file a complaint with the U.S. Department of Education, Office of Civil Rights ("OCR"), should they believe such service plan was not imlemented.

IV. REMEDIAL ACTIONS

Should the complainants not wish to continue the current placement of S.S. and so request, the District must reconvene the IEP team to determine placement in the least restrictive environment. In so doing, the District must document the alternatives considered and must consider any placements requested by the parents.

On or before April 1, 1997, the District must modify it's procedures for determination of eligibility for Section 504 and determination of eligibility for the Act. Such procedures shall demonstrate a clear distinction between each. Determination of elegibility for a person with a disability under Section 504 must ask the question, "Does the student's disability substantially limit one or more of the student's major life activities, such as learning?" Determination of eligibility under the Act must ask the question, "Does the student's disability prevent him or her from receiving reasonable educational benefit from regular education?" Documentation of these must be different and must reflect that difference.

The District must provide this office with a copy of these procedures within two weeks after development.

Dated this _____ day of February, 1997

____
Carol Amon, Federal Complaints Investigator

Case No.: **L97:109**

Status: Impartial Hearing Officer Decision

Key Topics: Individual Education Program (IEP)
Free Appropriate Public Education (FAPE)
Parental Consent Prior to Placement in Special Education
Stay-Put Provision

Issues:

- Is the IEP appropriate?
- Should the IEP be adopted even if the parents do not consent to placement?
- Has the student been provided a FAPE?

Decision:

- The IEP appears to meet all statutory requirements.
- The father has not objected to placement of his child in special education services. The father asserts that ADHD is his child's primary handicapping condition rather than SIED, but presented no evidence in that regard.
- The school district substantially complied with procedural safeguards in that the parents fully participated in the IEP development process.
- No evidence was received that which could reasonable be interpreted to establish that the IEP did not provide a FAPE, either on its face or in its brief implementation.
- The SIED identification and the IEP are appropriate, and are reasonably calculated to provide educational benefit to the student. Both should continue to define the student's educational requirements and goals until reviewed and revised consistently with the requirements of the IDEA.

Discussion:

- Confidentiality of assessment results.
- Identification of teachers accountable for the attainment of goals on an IEP is not required by IDEA.
- The IHO does not have any basis or jurisdiction to order that the student's education be limited to instruction in basic skills, that the parent have exclusive control over all discipline, or that the parent refrain from interference.
- Interim placement / stay-put status.

L97:109
STATE OF COLORADO

DECISION OF IMPARTIAL HEARING OFFICER

ISSUES

1) Is the IEP appropriate?

2) Should the IEP be adopted even if the parents do not consent?

2) Has T.L.D. been provided a FAPE?

PRELIMINARY MATTERS

Each of the parties submitted a request for due process hearing which was received by the Colorado Department of Education, Special Services Unit, on approximately April 15, 1997. The requests were heard together. The process for receipt, investigation, and resolution of the complaints in this matter is established in The Individuals With Disabilities Education Act, 20 U.S.C. 1401, *et.seq.* (IDEA), and its implementing regulations, 34 C.F.R. §§ 300.660-300.662. This statutory framework has been applied in the State of Colorado through The Colorado State Plan, The Colorado Exceptional Children's Educational Act, 20 C.R.S. § 22-20-101, *et.seq.* (CECEA); and The Colorado Rules for the Administration of the Exceptional Children's Educational Act, 2220-R-1.00, *et.seq.* (Colorado Rules).

The Hearing in this matter was conducted on June 9 and June 12, 1997, at the office of the IHO in Denver, Colorado (Hearing).

Identification of Parties:

The student whose education is in issue is referred to herein as "T.L.D." to preserve his privacy. T.L.D. is twelve years old, and has just completed the 7th grade at the time of hearing.

T.L.D.'s father represented himself and T.L.D.'s stepmother, identified herein as

Mrs. D.[1] The only issue identified by the parents for resolution at the hearing was whether T.L.D. can receive a Free Appropriate Public Education (FAPE) if Ms. Harkness and Ms. Field participate. The remedy requested by the parents at the hearing was: 1) cessation of all testing; 2) limitation of education to instruction in basic skills; and 3) parental control of all disciplinary matters.

Academy School District #20 (school district) was represented by an attorney, Mr. Bob Cohn. The school district asks the IHO to find: 1) that T.L.D. qualifies for special education services pursuant to the IDEA as an SIED student; 2) That the IEP is appropriate; 3) That the IEP should be instituted even if the parents do not consent; 4) That the father be ordered to refrain from interference with the curriculum established by the school district.

Jurisdiction:

On May 7, 1997, Peggy S. Ball was assigned as Independent Hearing Officer (IHO) to conduct the due process hearing.

Jurisdiction to hear and resolve these complaints is vested with the IHO pursuant to 2220-R-6.03, *et.seq.*; 34 C.F.R. 300.504(b)(3); and 34 C.F.R. 300.506, *et.seq.*

Time:

The initial 45 day deadline for decision in this matter expired June 2, 1997. However, such deadline was extended twice - once because of a delay in the designation of the IHO by the parties, and a second time in consideration of a request by the school district for extension of the initially scheduled hearing. The IHO found that the initial delay caused by the parent's failure to designate or strike proposed hearing officers constituted a waiver of objection to extension, and considered the fact that school was recessed for the summer break without any request for extended year services in ordering an extension of time until the date of this Order.

Subpoenas:

Subpoenas Duces Tecum were issued to the school district on request of the parent to the district and to Ms. Field.

Hearing Officer Impartiality:

At the outset of the due process hearing, the father asked the IHO to recuse herself, on the basis of an objection to *ex parte* prehearing communications.

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[1] T.L.D.'s natural mother apparently lives out of state and is not presently involved in any of these proceedings.

(1) The first asserted basis for objection was the Prehearing Conference. The IHO called the father, first at home, where Mrs. D. answered the phone, and then on father's cellular number, to participate in the scheduled telephonic prehearing conference. When the father learned that the school district's counsel was also on the line for the conference call, he hung up, in accordance with his earlier statements to The IHO that he would not participate in any hearing or conversation where the school district was also present or represented. The IHO found that by hanging up on the conference call, the parent voluntarily waived his right to participate, and The Prehearing Conference continued after the father hung up. Mrs. D. testified that she secretly remained on the line but did not participate or reveal her presence. The IHO questioned Mrs. D. at the Hearing about whether she overheard anything at the Prehearing Conference which she considered to indicate a lack of impartiality on the part of the IHO. She stated only that she was upset because The Prehearing Conference continued in the father's absence, and by the fact that there had been discussion at the Prehearing Conference about whether the Hearing would also take place as scheduled if the parent again chose not to participate. This discussion took place in the context of the scheduling of witnesses who would need to be brought in from their vacations, and the conclusion was that further research would need to be done before a decision would be made.

(2) Secondly, the father claimed he felt the IHO spent too much time talking with him on the telephone, in the absence of opposing counsel. The IHO acknowledges that the *ex parte* communications in this case were problematic. The father frequently called her on the telephone, but refused to talk to her if opposing counsel was on the line. The IHO has an obligation to explain procedures to a *pro se* party such as this parent. The father acknowledged at the Hearing that his communications with the IHO had been limited to procedural matters, and that the IHO had disallowed any discussions of substantive issues. To the extent that communications between the IHO and the father were excessive, that should inure to the benefit of the father; and the school district did not object to the impartiality of the IHO.

The IHO found there was insufficient indication of any lack of impartiality, and completed the process.

FINDINGS OF FACT

It is well documented that T.L.D. is very gifted intellectually, and is well above grade level in the development of academic skills.

Historical Information:

In 1993, the school district of Las Cruces, New Mexico, determined T.L.D. to be "severely emotionally disturbed as defined by 34 C.F.R. 300.5(b)(8)," and placed him in an accelerated/gifted program with ancillary psychological services

After moving to Colorado, T.L.D. was determined to fall within the definition of ADD or ADHD, as defined by Section 504 of the Rehabilitation Act, 29 U.S.C. Chapter 16; 34 C.F.R. Part 104, and was provided a 504 Accommodation Plan, beginning in the 5th grade.

Present Case:

In November of 1996, T.L.D. was referred by the school district to Dr. Jonelle C. Neighbor, Ph.D., L.P., Certified School Psychologist, for a comprehensive psycho-educational assessment, with parental consent. On November 19th, 1996, the father withdrew parental consent for such evaluation and the assessment was terminated. Dr. Neighbor's report was admitted at the hearing, and she testified by telephone. Dr. Neighbor did not identify any cognitive or learning difficulties, but did find T.L.D. to be at-risk with regard to his social and emotional development. She found him to be suffering from depression, and diagnosed Significant Identifiable Emotional Disability (SIED) as his primary handicapping condition. Dr. Neighbor also identified some attention problems, but felt they were not the primary problem. Marjorie E. Hasler, LCSW, and Mary Ryal, Speech/Language Specialist, also participated in this assessment and identification process. A staffing was held, but the parents refused to participate.

On February 13, 1997, a Recommendation for Expulsion was prepared by the school district, based upon enumerated alleged antisocial acts, including: 6 suspensions in as many months; inappropriate sexual activity in school; property destruction; aggressive behavior toward other students and toward himself; and threats to teachers.

After receiving the Recommendation for Expulsion, the father consented to a second evaluation for special education services, based upon a stipulation that a new evaluator would be identified. This assessment was completed in March of 1997 by Blake Storch, M.S., Certified School Psychologist, with the assistance of William D. Dowdle, School Social Work Specialist. In his report, Mr. Storch concluded that T.L.D. needs a highly structured educational environment to help him identify and develop socially appropriate skills and relationships, and an individualized behavior management program. Mr. Storch did not specifically identify T.L.D. as SIED-qualified in his report, but he did so identify him in his testimony at the Hearing.

The parents have commissioned a private assessment of T.L.D., and reportedly are planning to provide him with counseling in the private sector. The parents have consistently declined to allow reports from such testing or treatment to be sent to the school district, nor was such information provided to the IHO for consideration. Although the father referred during the Hearing to opinions from Dr. Grabert and Dr. Hoke, such opinions were not offered into evidence, nor had any such information been made available to any of the assessment teams or to the IEP team.

At the time of the second evaluation, T.L.D. was being provided private tutoring services by the school district, but was otherwise suspended from school pending the expulsion determination.

IEP\Placement Staffing:

The school district prepared a preliminary Individualized Education Program (IEP), and submitted a draft to the parents for review. A staffing was held on March 21, 1997, to determine T.L.D.'s eligibility for special education services and to review and complete the proposed IEP (Staffing).

Mrs. D. was present for the entire staffing. The father was present at the beginning and end of the staffing, but chose to absent himself for a middle portion of the staffing. The parents signed to verify participation in the staffing, but did not sign approval of the resulting IEP.

A list of professionals who attended the staffing is attached to the IEP, including Dr. Neighbor, Mr. Dowdle, Mr. Storch, Ms. Harkness (Special Education Director), Sue Cost (7th grade counselor), John Shaffer (teacher), and Jerry Maddox (Assistant Principal).

At the conclusion of this staffing the school district personnel believed they had a consensus of the participants, including the parents, for SIED identification and an IEP to be initiated on the next Tuesday when school was in session, in order to allow T.L.D. to return to school immediately from his suspension-pending-expulsion status.

Implementation:

On March 31, 1997, the school district sent a confirming correspondence to the parents, specifying how the IEP would be implemented, at least initially. T.L.D. was to attend three regular education classes each day and spend the remainder of his day in a special education classroom taught by Ms. Hall, who would be setting up an individual behavior management program with T.L.D. The parents did not sign this form and return it to the school district.

Issues arose between the father and the school district about the educational environment into which T.L.D. was placed when he returned to school. The father frequently told T.L.D. he was not allowed to do the work which was assigned to him. The father's stated policy was that T.L.D. was not to be allowed to write anything in his own words. Accordingly, when Ms. Hall assigned T.L.D. to write essays about current events and to keep a journal, the father vehemently objected. [2]

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[2] The father expressed in opening statement at the Hearing an opinion that writing in journals and answering open-ended questions constituted a form of "subliminal testing".

The father had objected to the inclusion of any form of counseling in the IEP, and was concerned that informal counseling was occurring. The father also claimed that the school violated T.L.D.'s rights of privacy pursuant to 20 U.S.C. 1232(h) by asking him to write in a journal and/or write essays in his own words about current events. The school district's position was that the father was interfering with the school's right to plan instruction and placing T.L.D. in a difficult and stressful in-between situation by forbidding him to complete his work.

T.L.D. was removed from school by the parent as a result of parental objections to Ms. Hall's teaching, and he remained on private tutoring status until the end of the year.

CONCLUSIONS OF LAW

In general terms, the purpose of the IDEA is to ensure that all children have available to them a FAPE, including special education and related services where such services are necessary to meet the unique needs of the student. 20 U.S.C. § 1400(c); 34 C.F.R. §§ 300.1(a), 300.8, 300.121.

I. Is the IEP appropriate?

Assessment:

There is adequate assessment information in the record to support the IEP, within the guidelines set forth in 2220-R-4.03(9). No further assessments are planned or requested by the school district at this time.

The parent represented in his opening statement at the Hearing that he believed the testing of T.L.D. was invalid because he represented that T.L.D. had been tested eleven times in two years, and that this frequent repetition could invalidate results. The father then inconsistently stated toward the end of the Hearing that he thought further evaluation was necessary. The father requested for the first time in this proceeding that an additional evaluation be performed at public expense, with a stipulation that instructional recommendations might be disclosed to the school district, but testing results would remain confidential to the parents only. This was not an issue which had been identified for resolution at the Hearing. In fact, the father had taken the position during prehearing procedures that he would not allow any further testing to occur.

Certainly there may be situations where it is in a child's best interest for a parent to obtain psychological testing or treatment in the private sector without sharing such information with the child's school. However, in planning a child's education, the school district can only be expected to consider information which has been made available to it.

See Section VI(3)(c) of the Colorado State Plan; 34 CFR 300.503(c). Therefore any assessments or recommendations of Dr. Grabert or Dr. Hoke are not relevant to T.L.D.'s educational planning until such time as the parents choose to submit appropriate information or testimony to the IEP team or appropriate staff members.

The father's request that additional testing be performed at public expense, pursuant to 34 C.F.R. § 300.503, without disclosure of the results to the school district, probably would not have been within the IHO's jurisdiction to authorize even if it had been timely identified for resolution at the hearing. The purpose of such testing appears to be intended by the statute to be the gathering of evidence to assist the educational process. The IHO is not aware of any provision which allows testing at public expense for exclusively private use.

Procedure:

Neither party raised any objections regarding the procedures followed in the creation of the IEP.

Content:

The IEP appears to meet all statutory requirements. Furthermore, it appears reasonably calculated to enable T.L.D. to receive educational benefit.

The parents objected that the IEP was not sufficiently specific in that it did not identify what teachers were to be accountable for attainment of specific goals. However, the IDEA requires only that the IEP contain statements of the student's present levels of educational performance, annual goals, and the specific education and related services to be provided to the student. *C.f.* **Letter to Hall**, 21 IDELR 58 (1995). It does not require the identification of specific teachers, instructional methods, or materials. Appendix C to the IDEA states, in Paragraph 41, (34.300-45 - 4/93):

> There should be a direct relationship between the IEP goals and objectives for a given child with a disability and the goals and objectives that are in the special education instructional plans for the child. However, the IEP is not intended to be detailed enough to be used as an instructional plan. The IEP, through its goals and objectives, (1) sets the general direction to be taken by those who will implement the IEP, and (2) serves as the basis for developing a detailed instructional plan for the child.

During closing arguments at the Hearing, the father raised the issue of Least Restrictive Environment (LRE). However, since the issue of LRE had not been identified as one for resolution at the Hearing, no evidence had been presented by either party as to the reasons why the IEP team considered this the Least Restrictive Environment or what other options were considered. The IEP indicates that the issues was considered as required. It would not be fair for the IHO to make any pronouncements in this issue since the witnesses who testified were not given an opportunity to address it.

Implementation:

II. Is T.L.D. receiving a FAPE?

Although the father was afforded an opportunity to present evidence that the child was not receiving a Free Appropriate Public Education, no evidence was received which could reasonably be interpreted to establish that the IEP did not provide a FAPE, either on its face or in its brief implementation. A FAPE may not be the parents' first choice, or even the choice of selected experts. It may not be the best choice. A FAPE simply is an education which fulfills minimum statutory requirements. **G.D. Westmoreland School District,** 930 F.2d 942, 17 IDELR 751, (U.S. Court of Appeals, 1st Circuit, 1991)

In **Hendrick Hudson Central School District v. Rowley,** 458 U.S. 176 (1982), the United States Supreme Court generally defined FAPE as personalized instruction with sufficient support services to permit a child to benefit educationally from the instruction. T.L.D. appears to have been provided such an education.

The father's objections did not relate to the level or type of special education services provided. Instead, the father's concerns were about the instructional content of Ms. Hall's classroom. He expressed concern that the family's values and privacy had been impinged upon by asking T.L.D. to express himself. The father's contention at The Hearing was that the school district has violated "The Hatch Act", presumably 20 USC 1232(h), in the type of assignments given in Ms. Hall's class. The IHO does not find that any assessment discussed herein was made for any improper purpose. The IHO does not have jurisdiction to enforce "The Hatch Act" except as related to matters decided elsewhere herein.

The federal courts have repeatedly held that parents do not have a constitutional right to control instructional elements of a child's education, such as teacher assignment or methods of instruction. *C.f.,* **Chavez v. Academy School District 20, et.al.,** No. 96-1360 (10thCir. 1996). In the absence of any showing that the instruction provided to T.L.D. violated the IEP or in some other manner prevented T.L.D. from receiving a FAPE, the IHO has no jurisdiction to evaluate it.

The IHO does not have any basis or jurisdiction to order that T.L.D.'s education be limited to instruction in basic skills, that the parent have exclusive control over all discipline, or that the parent refrain from interference.

The father also asserted in closing argument that the behavior which had resulted in the recommendation for expulsion and, in part, the SIED identification, had been caused by cessation of medications, or altered medication levels. The IHO has no evidentiary basis from which to evaluate the impact of medications which were being prescribed for T.L.D., although there are references in the assessments to the types of medications being prescribed. If established, the necessity and role of medications in managing T.L.D.'s educational environment would seem to support the SIED identification rather than negate it. The identification was not based upon conduct alone. Any pertinent information should be shared with the IEP team so that adjustments can be made as necessary.

One issue which was of concern to the IHO was the implementation of the IEP without written parental consent for placement. The IHO can readily understand the school district's motivation in initiating the special education program for T.L.D. on the basis of the consensus reached at the staffing alone, without waiting for the expected specific written consent for placement from the parent. This student's social adjustment issues will not be resolved through either of the other two options available at the time the placement was made – 1) solitary education through continuation of private tutoring; or 2) expulsion. Section 300.342(b)(2) of the IDEA requires the school district to implement the IEP as soon as possible after the staffing.

However, initial placement without written consent violated 2220-R-6.02, which gives the school district only three options: 1) obtain written consent from the parent; 2) If the parent refuses to give consent and the local school board believes that the child may be significantly harmed by the absence of such services, the board can contact the Department of Human Services to request that court dependency proceedings be initiated to obtain consent; or 3) the school district may initiate a due process proceeding. The IHO interprets this Rule to require that the pre-placement status be preserved as the interim placement during due process.

Here the school district implemented the IEP and then requested the Due Process Hearing. The result was that the stay-put status for a brief period of time during the pendency of the hearing process was the implemented IEP, until the parents withdrew T.L.D. to his previous status of privately tutored education.

The father has not objected to placement of T.L.D. in special education services. The father asserts that ADHD is T.L.D.'s primary handicapping condition rather than SIED, but presented no evidence in that regard. As noted above, the father's objections were to the curriculum being offered in the special education classroom. The tension between parent and school district which was created by issues such as the father's instruction to T.L.D. not to complete assignments which required him to write in his own words seems equally as likely to have occurred in the regular school environment as in the special education environment.

It must be noted the school district substantially complied with procedural safeguards in that the parents fully participated in the IEP development process. Adequate parental involvement and participation in formulating an IEP, not adherence to the laundry list of items in the IDEA appear to be the courts' primary concern in requiring that procedures be strictly followed. **Doe v. Defendant 1,** 898 F.2d 1186, 16 IDELR 930; **Hampton School District v. Dombrowolski,** 19 IDELR 1019.

Parental consent is an important right and safeguard for the parents. Hopefully, it both fosters and documents essential parent support for the child's educational program. However, it must not become a mechanism for power struggles or an impediment to meeting *bona fide* educational needs of the child. The parents and the educators each have important roles to play, and each must sometimes defer to the other.

Once the student was withdrawn by the parents to his previous suspension/expulsion status, the issue of interim placement became moot. T.L.D. was in the same stay-put status he would have been in if the implementation without written consent had not occurred.

CONCLUSIONS

The SIED identification and the IEP are appropriate, and are reasonably calculated to provide educational benefit to T.L.D. Both should continue to define T.L.D.'s educational requirements and goals until reviewed and revised consistently with the requirements of the IDEA.

Issued June 23, 1997.

Peggy S. Ball

Peggy S. Ball
Independent Hearing Officer

6.03 (8) (b) Officers and employees of school districts and administrative units.

6.03 (8) (c) Any person having a personal or professional interest, including persons involved with the care of the child, which would conflict with his or her objectivity in a hearing.

6.03 (8) (d) Parents of children with disabilities from birth to 21.

6.03 (9) Right to appeal decision of impartial hearing officer.

Either party may obtain state level review of the decision of the impartial hearing officer. The state level review shall be conducted on behalf of the Commissioner of Education by an administrative law judge of the Colorado Department of Administration, Division of Administrative Hearings.

6.03 (10) Procedure for appealing decision of impartial hearing officer.

6.03 (10) (a) Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

6.03 (10) (a) (i) A notice of appeal.

6.03 (10) (a) (ii) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

6.03 (10) (b) Simultaneously with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

Within five days of receipt of a notice of appeal, any other party may file a cross appeal.

6.03 (10) (c) The notice of appeal shall contain the following:

6.03 (10) (c) (i) The caption of the case, including case number and names of all parties.

6.03 (10) (c) (ii) The party or parties initiating the appeal.

6.03 (10) (c) (iii) A brief description of the nature of the case and the order being appealed.

6.03 (10) (c) (iv) A list of the issues to be raised on appeal.

6.03 (10) (c) (v) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

6.03 (10) (c) (vi) A certificate of service showing the date the copy of the notice of appeal was mailed to the Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

6.03 (10) (d) A notice of cross appeal shall contain those items listed in 6.03 (10) (c) (i-iv) above along with a certificate of service.

6.03 (10) (e) At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

6.03 (10) (f) Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative Hearings a designation of any additional portions of the transcript which the party believes are necessary for resolution of the appeal.

6.03 (10) (g) Whichever party appeals the decision shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

6.03 (10) (g) (i) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record.

6.03 (10) (g) (ii) Immediately upon filing any additional designations pursuant to Section 6.03 (10) (f) of these Rules, any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

6.03 (10) (g) (iii) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parent(s) shall not be required to pay for the cost of a copy of the tape recorded record for an appeal. The transcript or portions thereof shall be made available to any party at reasonable times for inspection or copying at the copier's expense.

6.03 (10) (h) Upon receipt of the notice of appeal, the administrative law judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the administrative law judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits and the decision of the impartial hearing officer.

6.03 (11) State level review procedures.

6.03 (11) (a) Unless otherwise ordered by the administrative law judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

6.03 (11) (b) In conducting a state level review, the administrative law judge shall:

6.03 (11) (b) (i) Examine the transcript and certified record received from the impartial hearing officer.

6.03 (11) (b) (ii) Seek or accept additional evidence, if needed.

6.03 (11) (b) (iii) Afford the parties an opportunity for oral or written argument, or both, if appropriate, at a time and place reasonably convenient to the parties.

6.03 (11) (b) (iv) Determine and assure that the procedure at the hearing before the impartial hearing officer was in accordance with the requirements of due process.

6.03 (11) (b) (v) Make a final and independent decision and mail such to all parties within 30 days of the filing or mailing of the notice of appeal.

6.03 (11) (c) The administrative law judge may grant specific extensions of any of the timelines once a timely appeal has been received.

6.03 (11) (d) In connection with the state level review, the parties shall have the following rights:

6.03 (11) (d) (i) To be accompanied and advised by counsel and by individuals with special knowledge with respect to the problems of children with disabilities.

6.03 (11) (d) (ii) If further evidence is to be taken, to present evidence and confront, cross-examine, and compel the attendance of witnesses.

6.03 (11) (d) (iii) To prohibit the introduction of any evidence through witnesses or documents at the hearing if the witness has not been identified or the document has not

Case No.: **L97:118**

Status: Impartial Hearing Officer Decision

Key Topics: Free Appropriate Public Education (FAPE)
Least Restrictive Environment (LRE)
Signifincant Identifiable Emotional Disability (SIED)
Self-Contained Classroom

Issues:

- Whether the student is appropriately identified as having a significantly identifiable emotional disability (SIED).
- Whether the student's placement in a self-contained classroom is the appropriate least restrictive environment.
- Whether the BOCS must provide special education services to the student at his neighborhood school.
- Whether the parent has unreasonably hindered the ability of the BOCS to provide a FAPE to the student.

Decision:

- IHO finds from consistent evidence that the student does have a SIED.
- The self-contained classroom is the student's current least restrictive environment.
- Neighborhood school does not offer a self-contained classroom and to serve the student in the neighborhood school would be to deny the student a FAPE.
- No conclusions are provided for the last issue. IHO determined that the last issue was unnecessary to his decision.

Discussion:

- Elements of the student's SIED and why the parent rejects the determination.
- Discussion of the need for a self-contained classroom.
- Discussion of the need for parental counseling.

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO

JAN 12 1998

Case No. L97:118

DECISION

J.K., Student, by T.K.

Petitioner,

vs.

SAN LUIS VALLEY BOARD OF COOPERATIVE SERVICES

Respondent.

Hearing commenced pursuant to notice on December 8, 1997, and concluded on December 10, 1997. The Student was represented by his parent, T.K. The Respondent was represented by Laura Freppel and Cheryl Karstaedt, attorneys.

This case has had a long, unusual and somewhat torturous procedural path. Some of the procedural issues were discussed in detail in my Order Denying Respondent's Motion To Dismiss, dated September 22, 1997. For the reasons therein noted in that Order, I suspended the 45 day rule indefinitely.

Prior to commencement of the hearing, the parties stipulated to certain facts and also stipulated that the issues presented by the appeal were:

1. Whether the Student is appropriately identified as having a significantly identifiable emotional disability (which for this decision I will abbreviate as SIED).
2. Whether the Student's placement in a self-contained classroom is the appropriate least restrictive environment.
3. Whether the BOCS must provide special education services to the Student at his neighborhood school.
4. Whether T.K. has unreasonably hindered the ability of the BOCS to provide a FAPE to the Student.

I have concluded that a resolution of issue #4 above is unnecessary to my decision and therefore have reached no conclusions regarding same.

The Student's IEP which identifies him as having a significantly identifiable emotional disability, places him in a self-contained classroom for most of the school day, and provides the Student with special education and related services at other than the school he would attend if he was not disabled. T.K.'s request for hearing challenges the provisions of the IEP. Thus, T.K. bears the burden of proof, Johnson v. Independent School District #14, 921 F.2d 1022 (10th Cir. 1990).

After careful consideration of the evidence, I find that T.K. has failed to meet her burden of proof and therefore determine issues #1-3 inclusive in favor of Respondent.

1. Educational Disability

The Student was born on October 4, 1986 and, at the time of the hearing, was in the fifth grade. The parties agreed and I so find that the Student was medically diagnosed some time ago with Attention Deficit Hypersensitivity Disorder (ADHD). ADHD is classified as a physical disorder and, primarily on that basis, T.K. urges me to find that the Student does not have a SIED.

I conclude that T.K. failed to meet her burden of proof on this issue. Further, I find from clear, consistent, and generally uncontroverted evidence rising to the level of being overwhelming, both that the Student has a SIED and that his SIED is his major disability, educationally and outside of school. I have no doubt that unless and until the Student's SIED is successfully remediated, the future is bleak for this child.

The Student has a well documented history of severe emotional and behavioral problems which have existed for many years. From September, 1994 through August, 1995, the Student lived in Minnesota and was educated there in the Whipple Heights Day Treatment program. T.K. characterizes this as a program to address the Student's ADHD. Although it did address his ADHD, I find the primary focus of that program was to address the Student's severe emotional and behavior problems, which problems prevented him from attending a regular school. Exhibit C, the Discharge Summary from Whipple, not only notes but concentrates upon the Student's many emotional problems including assaultive behavior towards adults and peers; resulting poor to non-existent peer relationships; defiance of adult authority; and extremely poor anger control, manifesting itself in assaultive behavior, turning over desks, destroying papers, and kicking furniture. The Discharge Summary concludes that "[b]ecause of [Student's] emotional instability and ...inability to control his anger at any given time,. it is recommended that [Student] be placed in a level 3 setting or a full-time EBD classroom until he is able to control his feelings of anger, sadness, happiness etc..." Although I am unaware of what a "level 3 setting" in Minnesota was at the time, I recognize and so find that "EBD" was the 1995 abbreviation for "emotional behavioral disorder" which, at the present time in Colorado is denoted as "SIED."

The Student moved to Iowa near the end of the summer of 1995. He was staffed in Iowa on 9-28-95 and placed into a hospital day setting rather than into a school to receive his education (Ex. D). I find from reviewing the staffing documents that this placement was made on the basis of the Student's severe emotional problems. The records from the hospital day program span only 30 school days and are rather sketchy; however, they indicate frequent and substantial problems with behavior (Ex. E). After about 30 days, the Student was re-staffed because T.K. had removed him from the hospital day program. At this second staffing, the Student was placed on a full home-bound tutoring program only. He was staffed a third time in February, 1996; the reason for that staffing is unclear from the record before. This third staffing placed the Student in a elementary school in a segregated class for all but 25 minutes daily for lunch, one weekly 30 minute visit to the library, and physical education for 30 minutes twice per week. A specific behavior management plan was adopted, leading me to the inevitable conclusion that in February of 1996, those working with the Student saw his inappropriate behavior as being his major educational disability (Ex. I). By April, 1996, the Student had graduated to integrated services also in science and music, but remained in a self contained classroom for children with behavior disorders for everything else at school (Ex. L).

Apparently during the summer of 1996, T.K. and the Student moved to Alamosa, Colorado. With that move, they became involved with the Respondent, as it is the administrative unit for special education for children living in Alamosa. I find from a preponderance of the evidence that on or about August 27, 1996, T.K. refused to grant permission for Respondent to conduct a full assessment of the Student (Ex. M). As a result, the Respondent had to determine a placement for the Student based primarily on records from Minnesota and Iowa. Respondent placed the Student in a SIED self contained classroom at Evans Elementary School in Alamosa for the 1996-97 school year (Ex. N). In determining that the Student was eligible for special education services, the Respondent identified his disabilities as being SIED, ADHD, and a perceptual or communicative disability, with SIED being identified as the primary disability (Ex. N, page 8). T.K. refused to sign the IEP but subsequently agreed to the placement after mediation (Ex. N, page 21-24). Given the information then available to Respondent, this was an entirely appropriate placement, Rule 2220-r-4.06, Colo. Rules for Admin. Except. Children's Ed. Act.

The Student had a number of well documented behavior problems at Evans, which culminated on October 1, 1996 with the Student having a violent behavior outburst at school, during which he turned over desks, destroyed property, and placed other students and his teachers at risk of physical harm. He was suspended as a result of this incident and was to enter mental health counseling. On or about November 11, 1996, while at a local mental health clinic, the Student again became totally out of control. He "destroyed his therapist's office, throwing books, breaking objects, kicking and hitting his sister" (Ex Q., page 1). His behavior at the clinic was so extreme that the Student was placed in restraints and was transported by ambulance to Parkview Hospital at Pueblo, where he was admitted for treatment of "...his increasing explosive and aggressive behavior" (Ex. R, page 1).

The Student returned to the Evans self-contained classroom, but at T.K.'s request initially this was only for half days due to T.K.'s concerns that the Student had not stabilized on medication to the degree he could tolerate full days. Undisputed school records show serious additional behavior problems throughout the remainder of the '96-'97 school year and for the '97-'98 school year.

T.K.'s argument that the Student is not SIEB takes two major parts. The first is to the effect that the Student has good peer relationships and therefore does not meet the SIEB criteria. I totally reject that argument. Analysis of peer relationships is but one element of the SIEB criteria, so even if the Student did have good peer relationships that alone would not be a basis to grant T.K. the requested relief. However, it is absolutely clear from the evidence that the Student does not have good peer relationships. To the contrary, the Student has almost no relationships with his peers and, to the extent he has any, they are extremely poor. T.K. testified that the Student has virtually no age appropriate friends or acquaintances outside of school. The evidence at school is that the Student has very limited interactions with his peers. Two major problems exist: first, the uncontroverted evidence is that the Student has extremely poor hygiene. He comes to school smelly, dirty, and sometimes wearing dirty clothes. The other students just do not want to sit near him or interact with him. Although T.K. insisted the Student's hygiene is not a problem, it is well documented not only with Respondent but also with prior school districts which have served him (Ex. L, for example). Second, the well documented and uncontroverted evidence is that when the Student is with his peers, he is likely to become physically and verbally aggressive toward them whenever things are not going to the Student's liking. Multiple examples of this behavior were given. It occurs particularly when the Student is playing a game and starts losing, but it also occurrs when the Student merely perceives that he has been wronged in some fashion by a peer. When upset, the Student is likely to become dangerous to his peers and himself unless prompt intervention occurs.

The other half of T.K.'s argument is that the Student does not have a SIED because the cause of his inappropriate behavior is failure of all school districts who ever attempted to educate the Student to properly deal with his ADHD. I reject that argument, too. I do find that the Student's ADHD likely does contribute to his rather outrageous behavior. Further, I am not convinced from the evidence that the Student's ADHD is the sole or even the primary cause of the Student's SIED. To the contrary, it is more likely that the cause of the Student's SIED is either unknown or is due to events in the Student's life other than just his ADHD. Regardless of etiology, the cause of a SIED and the existence of a SIED are not the same. That a student's SIED is caused by or results from a physical disability such as ADHD does not mean the student does not have a SIED. The SIED exists regardless of the cause. Here, I find from clear, consistent, and generally uncontroverted evidence that the Student does have a SIED.

2. Least Restrictive Environment

The current IEP (Ex. RR) provides for placement of the Student for most of the school day in a self contained SIED classroom. Although age-appropriate for fifth grade, I find that the Student functions academically at about the second grade level and he is educationally incapable of doing fifth grade work. The bulk of his academic instruction, most or all of which is geared to second grade work, is delivered in the self contained classroom.

The Student is integrated with non-disabled fifth graders about two hours per day for social studies, science and literature activities. When mainstreamed, the Student is accompanied by a paraprofessional who sits immediately next to him. The primary function of the paraprofessional is to immediately control inappropriate behavior by trying to keep the Student on task and physically restraining or removing the Student when necessary. The paraprofessional also helps the Student with the classroom subject matter.

T.K. asserts that the self contained classroom is not the least restrictive educational placement. Instead, she seeks an order that the Student be removed from the self contained classroom and placed in regular class, with a full time paraprofessional. I find not only that she failed to sustain her burden of proof of this issue but also that the placement desired by T.K. would deny the Student a FAPE.

The evidence is uncontroverted that the Student is so academically delayed he would be hopelessly lost trying to perform at the fifth grade level. He is simply incapable of doing fifth grade work. Such a placement would not offer him any realistic opportunity for educational advancement, would certainly exacerbate his SIED, would be a total waste of his time (and that of the fifth grade teacher), and thus would be a gross violation of Respondent's duty to provide the Student with a FAPE, Board Of Education Of The Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

The evidence is also uncontroverted that the challenged IEP does, in fact, not only offer the Student the opportunity to make educational progress, but that the evidence also shows that since the Student has been with the Respondent the Student has made educational progress. To say that this Student is an educational challenge is somewhat of an understatement. It is to the Respondent's credit, due to its skilled and caring teachers and staff, that progress has been made with this Student.

I have no doubt but that the placement urged by T.K. would be far more restrictive than as provided by the current IEP. In his current part time mainstream environment, the Student must be closely accompanied at all times by a paraprofessional. The primary purpose of the paraprofessional is to control the Student, physically if necessary, to prevent the Student from injuring others or himself. The testimony has convinced me that this need for and primary function of the paraprofessional is obvious to the Student's non-disabled peers. As a result the Student is stigmatized to some degree by his non-disabled peers as being "different" and not being part of "their" group. The Student is not unaware of this separation between himself and his non-disabled classmates. However, no such stigma exists in the self contained classroom. There, the Student does not have the paraprofessional at his elbow at all times. Thus, in the self contained classroom, the Student has more freedom than when mainstreamed and more of an opportunity to be one of the group. The self contained classroom is this Student's current least restrictive environment.

3. Neighborhood School

The Student presently resides at Blanca, Colorado. The Respondent is also the applicable administrative unit for special education students residing at Blanca. If the Student were not disabled, he would attend Sierra Grande Elementary School in Blanca.

The Student's IEP provides that he will receive services at Evans Elementary School in Alamosa. Alamosa is about twenty miles from Blanca. The reasons given by Respondent for assigning the Student to Evans in Alamosa rather than Sierra Grande in Blanca are that Sierra Grande does not have a self contained classroom for students with similar disabilities; there are not enough students in the Blanca area to make such a classroom economically or educationally feasible; the lack of students in the Blanca area with similar disabilities would isolate the Student into a tiny self contained classroom, likely consisting only of the Student; and there is a dearth of qualified teachers which would make it very difficult if not impossible to establish a program at Sierra Grande that would offer the Student a FAPE. I find from uncontroverted evidence that all the preceding reasons have a factual basis. The selection of Evans in Alamosa as the site of Respondent's area-wide self contained elementary school SIED classroom was based upon reason and logic, including considerations of centralized location for transportation and because the vast majority of the other students in the Student's self contained classroom are Alamosa residents. In such instances, the Student has no right to demand services in his neighborhood school and such is not required by IDEA, Murray v. Montrose County School District, 51 F.3d 921 (10th Cir. 1995).

4.

Although the overall IEP is not at issue before me and thus this part of my Decision is surplus, three deficiencies in the IEP are painfully apparent to me from this hearing. I discuss these here in the expectation they will be addressed at the next staffing.

My first concern is that T.K. is having a great deal of difficulty accepting that the Student has a severe emotional disability. On the one hand, T.K. is a well educated person who is clearly concerned for the Student's welfare. On the other hand, T.K. is so overwhelmed by her wishes that all the Student's problems were only manifestations of

ADHD; that he has no "independent" emotional disabilities; and all his problems would disappear if "the world" would just recognize his only disability as being ADHD and provide him with ADHD educational strategies, that T.K. simply cannot or will not see the forest for the trees. As discussed in Section 1 of this Decision, it is clear to me and to most, if not all, of the Student's past and present service providers that SIED and not ADHD is the Student's major disability. This problem of T.K. is not particularly unusual. While no parent wishes their child to be disabled, it seems more socially or otherwise acceptable if the disability is physical rather than emotional. If T.K. can learn to accept that the Student does have a SIED and become more involved in efforts to remediate it, the Student will benefit.

The second concern is that on occasion T.K. has had confrontations with the Student's classroom teacher in which the teacher was publicly berated, had her competence questioned, or otherwise was inappropriately treated. These have occurred in the Student's presence or under such conditions and at such times that it was obvious the Student would learn of them. I find from uncontroverted facts that these confrontations have been used by the Student as an excuse for his behavior and in attempts to manipulate and defy his teachers by threatening that T.K. will sue them if the teachers do not do as the Student desires. I am alarmed that T.K. is in denial regarding her behavior in this regard and thus fails to see how these actions adversely affect the Student's progress.

My third concern is regarding the clear, consistent, and uncontroverted evidence that the Student comes to school smelly and dirty and occasionally in dirty clothes. This happens frequently enough that it has had a detrimental effect on the Student's already inadequate peer relationships and contributes to his inability to develop friends. The IEPs note the existence of these issues, but have consistently failed to explore the cause or propose a program to remediate them although same are certainly matters within the scope of this child's needed special education and related services. For example, it is unknown from the record whether the Student has any basic personal hygiene knowledge or skills. Compounding the situation is that T.K. appears to be in denial regarding these problems; in any event, she clearly fails to recognize how detrimental the hygiene problem is to the Student.

T.K. expressed concerns at the hearing that Respondent felt her to be a "bad" parent and that Respondent might be "out to get her," perhaps by involving child welfare authorities. Respondent specifically denied these allegations. I have seen no evidence that supports T.K.'s concerns. Instead, I see them more as being a manifestation of T.K.'s problems as discussed above. I have no doubt but that T.K. does have the Student's best interests at heart.

The problem is that T.K. simply has either not recognized or accepted the existence of the Student's disability or of the hygiene problem. The Respondent has failed to discharge its duty regarding these problems, the existence of which I find

Respondent is or unquestionably should have been aware. T.K. is unquestionably in need of parental counseling and education in this regard, which is a related service per 34 C.F.R. §300.16. I am not the first to note that parental counseling and education needed (Ex. R, page 2). The Student is unquestionably in need of assessment and remediation regarding the hygiene problem, and T.K. may also need parental counseling and education regarding same. These are, of course, FAPE issues.

As noted above, as these issues are not properly before me, I therefor enter no order that they be addressed in the next IEP. I certainly have the hope that they will be addressed in the next IEP and appropriate programs regarding them included in the next IEP.

Based upon the preceding, it is my decision that the relief requested by T.K. in the within appeal be and hereby is DENIED.

Dated: 1-9-98.

Bruce C. Bernstein
Impartial Hearing Officer

Certificate of Mailing

A true copy of this document was mailed on 1-9-98 as follows:

[redacted]

Cheryl Karstaedt, Esq.
2995 Canyon Blvd. #400
Boulder CO 80302

Colo. Dept. of Education
Special Education Services Unit
201 E. Colfax Ave.
Denver CO 80203

Susan Hoppman

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO
Case No. L97:118

FEB 03 1998

AMENDMENT TO DECISION

J.K., Student, by T.K.

Petitioner,

vs.

SAN LUIS VALLEY BOARD OF COOPERATIVE SERVICES

Respondent.

It has come to my attention that I failed to discharge my duty as hearing officer in that I did not furnish Petitioner with a copy of the applicable procedures to appeal my Decision.

Therefore, I AMEND my decision dated 1-9-98 by adding the following paragraph to same:

> Each party has the right to appeal my decision. Attached hereto and incorporated herein is a copy of the applicable procedures which must be followed to appeal.

I do this by way of amendment so that the effective date of my decision is now 1-30-98, and the time to file an appeal shall be based on said date.

Dated: 1-30-98.

Bruce C. Bernstein
Impartial Hearing Officer
1828 Clarkson Street, Denver CO 80218
(303) 830-2300; Fax (303) 830-2380

Case No.: **L97:125**

Status: Impartial Hearing Officer Decision

Key Topics: Individual Education Plan (IEP)
Least Restrictive Environment (LRE)
Free Appropriate Public Education (FAPE)

Issues:

- Is the IEP, developed by the District, appropriate in that it provided the student with a FAPE?
- Should the program at The Meeting School (TMS) in New Hampshire be adopted as the IEP for the student?

Decision:

- The IEP is appropriate in that it provides the student with a FAPE.
- The placement at TMS is not appropriate.
- The placement at TMS in not the LRE as required under IDEA.
- A TMS placement is inappropriate because there is no evidence that the student is benefiting educationally.

Discussion:

- Discussion and weight of cases: *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), *Doe V. Board of Education of Tullahoma City Schools*, 9 F.3rd 455 (6th Cir. 1993), *Blickle v. St. Charles Community United School District No. 303*, 20 IDELR 167 (1993).
- Parent request for tuition reimbursement at existing school is denied.

DEC 22 1997

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

CASE NO. L 97:125

FINAL ORDER

In the matter of

[redacted] through his parents [redacted] and [redacted]

Petitioners,

v.

PUEBLO SCHOOL DISTRICT NO. 70,

Respondent.

INTRODUCTORY STATEMENT

Hearing was held in Pueblo, Colorado, on November 21, 22, and 25th, 1997, before Richard G. Fisher, Impartial Hearing Officer (IHO). Jurisdiction is conferred by the Individuals With Disability Education Act (IDEA) 20 U.S.C. § 1450, 34 C.F.R., § 300, et. seq., and part VII of the current Colorado Department of Education State Plan.

The Petitioners appeared personally and by Melinda Badgley Orendorff, Attorney at Law, Pueblo, Colorado.

The Respondent appeared by Jill S. Mattoon, Attorney at Law, Pueblo, Colorado.

The hearing was held pursuant to a request for a due process hearing by the Petitioners dated September 10, 1997. The issues to be determined are as follows:

A. Is the Individual Education Plan (IEP) dated November 6, 1997, developed by Pueblo School District No. 70 (The District) appropriate for [redacted] in that it provides him with a Free Appropriate Public Education (FAPE)?

B. Should the program at The Meeting School (TMS) in New Hampshire be adopted as the IEP for [redacted]?

After the hearing opposing counsel agreed to file briefs and supporting legal authority by December 5, 1997, which was done.

FACTUAL BACKGROUND

[redacted] is a fifteen-year-old special education student whose disability is Attention Deficit Hyperactivity Disorder (ADHD).

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Up until the sixth grade, [redacted] was home-schooled by his parents. The family consists of [redacted] his parents, and a sister three years older than [redacted] The family home is in Beulah, Colorado, a small mountain town approximately 30 miles west of Pueblo.

[redacted] mother, is a self-employed musician, "educator", and music therapist.

[redacted] father, is a self-employed musician, music therapist, and composer.

Both parents are interested in the outdoors, hiking, the environment, etc.

From birth up until approximately age 12, [redacted] had a history of depression, encopresis, (leaking bowel which results occasionally in fecal staining,) severe sleep disorders, high frustration level, various learning disabilities, and episodes of rage. Most of these difficulties, except for the encopresis, have improved through treatment of chemical imbalances at the Carl Pfeiffer Treatment Center in Chicago (Exhibit A).

When [redacted] entered the District as a sixth grader at the Connect School, a charter school within the District, he was well behind his grade level in most areas. This was probably due to the physical problems which were treated at the Pfeiffer Clinic and to the home schooling which seems to have been poorly thought-out and erratically administered.

[redacted] was staffed and placed in special education in the eighth grade in 1994. His disability at that time was Perceptual Communication Disorder (P/C), Exhibit E. However, he was removed from special education at his father's request in 1966 prior to entering Pueblo County High School (PCHS) in the ninth grade.

The Connect School had a no-fail policy, but [redacted]'s performance seemed to improve.

When [redacted] entered PCHS in September, 1996, he was placed in the Choice Program, a program which was designed for students who did not excel in a traditional classroom setting.

When things started going badly at school, the parents became concerned and requested a staffing which was held on October 25, 1996. Exhibit I. At that time apparently [redacted]'s disability was determined to be P/C at his father's request although on Page 4 of the Exhibit it mentions "diagnosed ADD". The IHO notes that pages 2 and 3 are missing from this Exhibit.

At any rate, after the IEP of October 25, 1996, was prepared, some accommodations were made for [redacted]. He was allowed to take tests in the Special Education Room, read to him by the teacher, he was asked by his other teachers to do less work, etc.

Apparently the goal of the Choice Program is to link all of the material in the core classes together and this terminates at the end of the term in what is call the Exhibition. Three or four students work together on a project chosen by them and then divide the subject up into different aspects. Each student gives a presentation on the aspect of the subject he as chosen during the Exhibition.

[redacted]'s group had chosen the Gulf War, and his part was to be the music of the period, a subject he was supposedly interested in.

According t his teacher's testimony, he did very poorly at the Exhibition. No one knows why he seemed to put so little effort into this.

Unfortunately, a big part of the final grades are dependent on the Exhibition.

During the 1996-97 school year, [redacted] was never a discipline problem in any of his classes, and many of his teachers felt that he was able to comprehend the material if he put his mind to it..

His main problem was his failure to turn in his homework. His father attributed this to the fact that he was "disorganized". He stated that many times [redacted] would leave for school with the homework in his backpack, but that it was never turned in.

One incident occurred at the end of the first semester when [redacted] was at a convenience store near the school at the time he should have been taking a final.

This reinforced the parents' concern that he would become influenced by the "wrong kids".

[redacted] was arrested on May 14, 1997, for allegedly selling hallucinogenic mushrooms. He as also suspended from school at that time. Exhibits P,Q, R. However, after it was found that the mushrooms were not hallucinogenic, a reassessment was held on May 21, 1997, and the suspension was lifted. It was determined that [redacted] should be homebound until the end of the semester.

The IHO certainly does not condone the statements made by two assistant principals in this matter.

Nevertheless, it seems as if this incident has strengthened the belief of the parents that [redacted] will be with the wrong crowd if he stays at PCHS.

On May 22, 1997, Greg Keasling, Director of Special Education for the District, sent a Notice of Re-Assessment Form to the parents along with a letter. Exhibit S,W

However, Mr. Keasling was informed that the battery of tests requested could not be completed before school was out because [redacted] was recovering from the stress of the suspension, Exhibit DD, and was to attend an Outward Bound experience in the early summer.

[redacted] attended Colorado Outward Bound School in early summer 1997 after which his instructors gave him glowing reports in every category, including leadership, team spirit, communication, ability to set goals and see them through, positive attitude, curiosity, self-denial, and compassion. Exhibit CC

Mr. [redacted] contacted Mr. Keasling in mid-July saying [redacted] was ready for the tests, but Keasling informed him it would be August before the staff was back to administer the tests.

According to the Director of TMS, [redacted] fulfilled the TMS policy for an interview with the faculty and non-returning students by a telephone interview on August 17, 1997. TMS requested [redacted]'s transcript from the District and their School Transcript Release form was signed and sent to the District by Mr. [redacted] on July 25, 1997.

Ms. Walters, [redacted]'s ninth grade Science teacher, testified without objection that she was told in late August by Mrs. [redacted] that [redacted] was "going to go to an expensive school in the East" and that the parents were going to try to get the District to pay all or some of the costs. The IHO notes that this testimony was never rebutted by the Petitioners.

An IEP staffing meeting was convened on September 3, 199, Exhibit D, however, it was recessed when the parents felt their concerns were not being addressed and that the District did not have a program that offered [redacted] what he needed, and that they were going to pursue due process.

One of the options which was discussed was the Tech Academy. Mr. [redacted] called the Director, Kent Muckle, the next day who told him tenth graders were not accepted and that it would be very difficult for a special ed student. Exhibit II

This was not discussed with Mr. Keasling, who also had not discussed it with Mr. Muckle. Exhibit JJ.

The first time private placement was requested was on September 3, 1997,, at the IEP staffing.

According to Ms. Stillwell, the Director of TMS, Sequoia was accepted by TMS on September 5, 1997.

TMS is a residential school located on a farm in rural New Hampshire. At the present time there are eleven students, all of whom live in the homes of faculty members and their families. The students attend very small classes, sometimes held in a home, and must help with the work around the farm, such as moving the sheep and digging cesspools. Exhibit EE.

The IEP staffing was reconvened on November 6, 1997, after which an IEP was prepared for [redacted] Exhibit E. This IEP calls for [redacted] to take all courses but Band and P.E. at the Tech Academy. His academic classes, such as Biology and English, are offered at the Academy. His main course would be Computer Assisted Drafting. He also would be involved in some tours such as of a fish hatchery, etc.

The parents and their advocate, Deenna Nordyke, feel that the IEP looks good on paper but it is not realistic. In other words they feel the District cannot deliver on the IEP successfully.

[redacted] is now fully involved at TMS. He is taking three classes - Persuasive Writing, Algebra I, and Wellness. These classes are in the morning. In the afternoon he participates in work study. This consists of moving sheep, shoveling manure, and other form work under the tutelage of a PhD biochemist from M.I.T.

Dr. Susan Middleton, M.D., [redacted]s psychiatrist, testified that his diagnosis is ADHD. [redacted] needs a highly structural, well-organized program. He is in need of no psychiatric care, except "crisis therapy." Further, he has been successful in quite a number of areas in school. Exhibit B

LEGAL BACKGROUND

Originally enacted as the Education of the Handicapped Act, the Individuals with Disabilities Education Act ("IDEA") provides federal funding to assist states in educating disabled children. 20 U.S.C.§ 1400 et seq. (1988 & Supp.III 1991). States receiving federal funds in this program must comply with specific procedures and provide each disabled child with a "free appropriate public education" through development and implementation of an individualized education program ("IEP"). 20 U.S.C. § 1412

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(Supp.III 1991). A "free appropriate public education" is an education that guarantees a reasonable probability of educational benefits at public expense. *Board of Education of Community Consolidated School District No. 21, Cook County, Illinois, v. Illinois State Board of Education*, 938 F.2d 712, 715 (7th Cir.1991) (citing *Rowley*, 458 U.S. at 188-89). Participant states must provide specialized instruction and related services designed to provide each student with educational benefits. *Rowley*, 458 U.S. at 201.

The IEP is the primary vehicle for delivering the appropriate educational services to each disabled child. See *Honig v. Doe*, 484 U.S. 305, 311 (1988). Among the procedural safeguards afforded to the child is the opportunity for the child's parents or guardian to seek administrative review of the formulation, modification and implementation of the IEP. 20 U.S.C. § 1415 (1988 & Supp.III 1991). Any party to such a hearing may appeal the administrative hearing results to the appropriate state educational agency. Id. Any party aggrieved by the state agency's decision may seek relief by filing an action in a state court or in a U.S. District Court. Id.

In *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), the leading case on this subject, the court states as follows:

> "When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education" we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

FINDINGS AND CONCLUSIONS

I. THE IEP DATED NOVEMBER 6, 1997, IS APPROPRIATE IN THAT IT PROVIDES [redacted] WITH A FAPE.

A. Petitioner argues that the November 6, 1997, IEP is inappropriate as to timeliness, effectiveness, and District capabilities.

1. Timeliness - The District, through their Special Education Director, attempted to have [redacted] tested prior to the end of the 1996-97 school year by a request dated May 22, 1997. Exhibit S,W.

He was informed that this would have to wait until later in the summer because [redacted] had not recovered from the "stress" of the suspension, etc. Exhibit DD. [redacted] was also going on an Outward Bound excursion in the early summer, an activity in which he was rated by his instructors as doing outstanding work and appeared to have no signs of stress. Exhibit CC.

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The parents cannot now be heard to say that the delay in the testing was the fault of the District.

Further, the IEP staffing was covened on September 3, 1997, as close a time as possible to when the testing, which incidentally showed that [redacted]hand made remarkable strides during his 4 years at PCHS, was completed. It is obvious from the testimony and the exhibits that the parents had decided to send [redacted]to TMS as early as July, 1997, Exhibit 4, testimony of Ms. Walters. Further, when they attended the staffing on September 3, 1997, they would accept no other placement but TMS.

2. Effectiveness - The Petitioners argue that the District would be unable to implement the IEP successfully. However, since [redacted]was already enrolled in TMS in far away New Hampshire, it is impossible for this IHO to know if the IEP would have been successfully completed or not.

Counsel points to the encopresis and how this was not addressed in the IEP. However, there is nothing in the record to show that it is being addressed more adequately at TMS. In fact, the [redacted]had to make an emergency flight to the East when [redacted]had an attack and have him hospitalized.

II. THE PLACEMENT AT TMS IS NOT APPROPRIATE.

A. THE TMS PLACEMENT IS NOT THE LEAST RESTRICTIVE ENVIRONMENT (LRE) AS REQUIRED UNDER IDEA.

In *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993) the Court states as follows:

"In *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983), this Circuit set out its interpretation of the mainstreaming requirement of the federal Act:

> "The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act.

"However, this Court recognizes that even though the preference for mainstreaming is very strong, there are still situations in which,

> "some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

Id., at 1063.

"Appellant does not fall within any of these categories. The record does not support a finding that the benefits to appellant from mainstreaming would have been marginal or that the specific services which he needed could not feasibly be provided in the non-

> segregated setting, much less that the benefits to appellant from such services provided in a segregated setting would far outweigh the benefits from mainstreaming. Indeed, the feasibility of providing those services in the non-segregated setting is demonstrated by the specialized and detailed IEP crated by the M-Team. Finally, there is no mention in the record of appellant's being a "disruptive" child. Under these circumstances, the Act mandates that among "appropriate" placements the least restrictive alternative must be chosen.
>
> "While the Brehm school is certainly an appropriate, and in some respects even a superior, placement, it is clearly far more restrictive than the IEP proposed by the Board. All students at the Brehm School are learning disabled, handicapped children; that school therefore provides a child no opportunity for educational interaction with non-handicapped students.
>
> "The school system's proposed placement, on the other hand, offers the child an appropriate placement in a setting that is essentially a modified mainstream educational setting, allowing maximum contact with non-handicapped children. The district court did not err in holding that the IEP proposed by the Board was the least-restrictive, appropriate placement for appellant."

The Court concluded by stating:

> "Appellants parents removed him from the free public school and placed him in a private school at their own peril. They are responsible for the cost of doing so. Appellants' parents assumed the risk of responsibility for the cost of appellant's private education by removing appellant from the Tullahoma schools without giving the proposed IEP a chance."

See also *Blickle v. St. Charles Community United School District No. 303*, 20 IDELR, 167 (1993).

> "When a residential placement for educational purposes is considered, the determination of the necessity of such a placement shall be individually made, based upon evidence that the student's needs are so profound or unique that his/her educational needs cannot be met in a less restrictive placement. Such placement shall be made when recent diagnostic assessments and other pertinent information indicate that, while the student can benefit from instructional services, he/she is so severely handicapped that his/her educational needs cannot be met in a less restrictive environment. 23 Ill.Adm.Cd. ch. I § 226.420(a)."

B. TMS PLACEMENT DOES NOT CONFORM WITH 34 C.F.R 300.552 PLACEMENTS WHICH REQUIRES THAT:

"Each public agency shall ensure that:

(a) The educational placement of each child with a disability -
  (1) Is determined at least annually;
  (2) Is based on his or her IEP, and
  (3) Is as close as possible to the child's home.

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C. A TMS PLACEMENT IN INAPPROPRIATE BECAUSE THERE IS NO EVIDENCE THAT [redacted] IS BENEFITING EDUCATIONALLY.

The IHO finds that the quality of educational benefits being offered by TMS to [redacted] is woefully inadequate. None of his instructors is qualified in Special Education, nor are they certified by the State of New Hampshire. From Exhibit 4 and the testimony of the instructors, it is impossible for the IHO to determine that [redacted] is making progress in English and Math.

This is not to say that TMS is not a meaningful life experience for [redacted] or that overall he will not benefit from it. However, it does not fall under the standard that Congress had in mind when IDEA was passed into law as a basic opportunity for all students as is outlined in *Rowley (supra)*.

D. IF FOR SAKE OF ARGUMENT THE TMS PLACEMENT WERE MORE BENEFICIAL TO [redacted] THAN HIS IEP AT THE DISTRICT, THE DISTRICT IS NOT OBLIGED TO IMPLEMENT IT. SEE *DOE V. BOARD OF EDUCATION (SUPRA)*.

> "The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA."

See also *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84 (D.C.Cir. 1991)

> "On appeal, we noted that the Act does not require that a placement maximize the potential of the handicapped child; rather, the placement need only provide a program that is "reasonably calculated to enable the child to receive educational benefits." 862 F.2d at 886 (quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)). We observed that the district court, in requiring the residential placement, appeared to have as its unspoken premise. . . that since Alexander was making progress at Willow Street-Keystone, it followed that any inferior placement was not appropriate. Appealing as that view must be, it is inconsistent with the "some educational benefit" standard of *Rowley* and is strongly suggestive of reliance on the potential-maximizing standard that *Rowley* forbids."

In this particularly moving case (Kerkam) where the severely handicapped child was denied institutional placement from which he had benefited in favor of day placement with home living, the court concluded as follows:

> "When confronted with a case like Alexander's, no decision maker can casually deny a child and his overburdened parents resources they can so well use; perhaps this is what the hearing officer meant when she called this "a difficult decision." Hearing Officer's Determination, at 9 (Apr. 30, 1984), J.A. 95. The command of Congress, however, is not difficult to discern. Congress has decided that every handicapped child should receive an appropriate education at public expense. The District of Columbia has met that standard. The Kerkams have laudably provided their child with a program intended to maximize his progress, but the Act does not require the District to reimburse them. The judgment of the district court is therefore
> Reversed."

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ORDER

The District's IEP dated November 6, 1997, is hereby ordered to be the IEP for [redacted] [redacted] for the 1997-98 school year as it meets the standards of the *Rowley* case (supra) in that it provides [redacted] with a Fair Appropriate Public Education.

The parents' request for tuition reimbursement for [redacted] at the existing school is denied as the District's IEP of November 7, 1997, is ordered to be proper.

Further, the IHO holds that under any circumstances The Meeting School program is improper since it does not meet the mandated standard of the least restrictive environment.

Done this 17th day of December, 1997, at Denver, Colorado.

Richard G. Fisher

Richard G. Fisher
Impartial Hearing Officer
3686 South Forest Way
Denver, Colorado 80237-1015

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CERTIFICATE OF SERVICE

I certify that on this 17 day of December, 1997, a true and correct copy of the foregoing Final Order was placed in the United States Mail, postage prepaid, addressed to the following:

Pearl McDuffie
Special Education Services Unit
Colorado Department of Education
201 East Colfax
Denver, Colorado 80203-1704

Melinda Badgley Orendorff
Attorney at Law
409 North Main Street, Suite 413
Pueblo, Colorado 81003

Jill S. Mattoon
Attorney at Law
Thatcher Building, Suite 650
Pueblo, Colorado 81003

[redacted]

Greg Keasling
Director of Special Education
Pueblo School District No. 70
P. O. Box 575
Pueblo, Colorado 81002

Richard G. Fisher

c. Any person having a personal or professional interest which would conflict with his or her objectivity in a hearing.

d. Parents of children with disabilities from birth to 21.

7. Right to appeal decision of impartial hearing officer.

a. Either party may obtain state level review of the decision of the impartial hearing officer. The state level review shall be conducted by an Administrative Law Judge of the Colorado Department of Administration, Division of Administrative Hearings.

8. Procedure for appealing decision of impartial hearing officer.

a. Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

(1) A notice of appeal; and

(2) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

b. Simultaneous with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Colorado Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

Within five days of receipt of a notice of appeal, any other party may file a cross-appeal.

c. The notice of appeal shall contain the following:

(1) The caption of the case, including case number and names of all parties.

(2) The party or parties initiating the appeal.

(3) A brief description of the nature of the case and the order being appealed.

(4) A list of the issues to be raised on appeal.

(5) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

(6) A certificate of service showing the date the copy of the notice of appeal was mailed to the Colorado Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

d. A notice of cross-appeal shall contain those items listed in VII., B, 8, c, (1) - (4) above along with a certificate of service.

e. At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

f. Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative hearings a designation of any additional portions of the transcript which that party believes are necessary for resolution of the appeal.

g. Whichever party appeals the decision shall insure that such transcript is filed with the Division of

Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

(1) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record..

(2) Immediately upon filing any additional designations pursuant to Section VII., B., 8., F. any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

(3) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parents shall not be required to pay for the cost of a copy of the tape recorded record for an appeal. The transcript or portions thereof shall be made available to any party at reasonable times for inspection or copying at the copiers expense.

g.. Upon receipt of the notice of appeal, the Administrative Law Judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the Administrative Law Judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits, and the decision of the impartial hearing officer.

9. State level review procedures.

a. Unless otherwise ordered by the Administrative Law Judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

Case No.: **S97:125**

Status: State Level Review

Key Topics:
Individual Education Plan (IEP)
Free Appropriate Public Education (FAPE)
Private Placement
Least Restrictive Environment (LRE)

Issues:

- Whether the IHO erred in concluding that the IEP developed by the District affords a FAPE to the student.
- Whether the IHO erred in concluding that The Meeting School (TMS) was not an appropriate placement for the student.

Decision:

- The IEP afforded a FAPE.
- The Meeting School is not an appropriate placement for the student.
- Since the District has offered the student a FAPE and TMS is not an appropriate placement for him, the District has no obligation to bear the costs of the student's education at TMS.

Discussion:

- Although the IEP was not prepared in a timely manner, it nonetheless afforded a FAPE under the circumstances of this case. Plaintiff has failed to establish that the District lacked the ability to deliver the educational program outlined in the IEP. The IEP's failure to address encopresis further does not deprive him of a FAPE. The concern and distrust of the District by the plaintiff is not so strong that it affects the students ability to receive educational benefit from the IEP.
- Plaintiff has failed to establish that he is receiving educational benefit from TMS. As a part of this determination, the Administrative Law Judge has considered that his teachers are not certified in special education. In addition, since there is no evidence that the student needs a residential setting, his placement at TMS is not the least restrictive environment.

APR 23 1998

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 98-02 S97:125

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[redacted] by and through his parents, [redacted] and [redacted] [redacted],

Appellant,

v.

PUEBLO SCHOOL DISTRICT NO. 70,

Appellee.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"); the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq.*, C.R.S. (1995 & 1996) ("ECEA"); and Part II, Section A, VII of the Colorado Department of Education, Fiscal Years 1995-97 State Plan. Oral argument in this matter was held on September 4, 1997, before Administrative Law Judge Nancy Connick. Appellant [redacted] ("[redacted]" or "Appellant"), was represented by Melinda Badgley Orendorff, Esq. Pueblo School District No. 70 ("District') was represented by Jill S. Mattoon, Esq.

PROCEDURAL BACKGROUND

[redacted] through his parents [redacted] and [redacted] (collectively "the [redacted]"), filed a request for a due process hearing in this matter on September 10, 1997. The request reflected that the [redacted] had placed [redacted] at a private school and essentially sought reimbursement for this placement. On October 3, 1997, Richard G. Fisher was selected as the Impartial Hearing Officer ("IHO"). An evidentiary hearing was held on November 21, 22, and 25, 1997, and the IHO issued a Final Order on December 17, 1997.

The Final Order found that the District had no obligation to reimburse the [redacted] for the costs of educating [redacted] at The Meeting School, the private school he was then attending. The IHO found that the District had offered [redacted] a free appropriate public education (that his Individualized Education Plan was timely and that he had not proven the District could not implement that plan) and that his current

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placement at The Meeting School was not appropriate (it was not the least restrictive environment and there was no evidence that he was benefitting educationally).

[redacted] subsequently filed an appeal. The District filed no cross appeal and concedes that [redacted]'s appeal was timely filed. Additional testimony was taken on March 4, 1998. By agreement of the parties, briefs were filed by March 6, 13, and 17, 1998; oral argument was held on March 19, 1998. As a result of the oral argument, the Administrative Law Judge afforded the parties an opportunity to submit additional proposed findings of fact and to object to the proposed findings of the other party. Both parties submitted additional findings. On April 8, 1998, Appellant also objected to certain of the District's proposed findings, at which time this matter was at issue. The Administrative Law Judge has reviewed the transcript of the hearing in this matter in its entirety and now issues this decision upon state level review.

ISSUES ON APPEAL

As clarified in his brief and at oral argument, Appellant raises the following issues on appeal, some of which the Administrative Law Judge has consolidated:[1]

1. Whether the IHO erred in concluding that the November 6, 1997 Individualized Education Plan ("IEP") developed by the District affords [redacted] a free appropriate public education ("FAPE") in light of the following:

    a. The timeliness of the IEP.

    b. The District's ability to provide the program described, based on [redacted]'s asserted lack of progress toward 1996 IEP goals and objectives and inherent difficulties in providing the field trips described.

    c. The IEP's failure to address [redacted]'s encopresis.

    d. The effect of the asserted fear and distrust of the District by [redacted] and his parents on the educational benefit [redacted] can receive at a District school.

2. Whether the IHO erred in concluding that The Meeting School was not an appropriate placement for [redacted] in light of the following:

    a. The asserted educational benefit [redacted] is receiving from TMS.

    b. TMS's asserted provision of a FAPE, despite the fact that its teachers are not certified by the State of New Hampshire and are not certified in special education.

c. TMS's asserted provision of a FAPE, despite the preference for the least restrictive environment.

FINDINGS OF FACT

With three limited exceptions addressed in the Procedural Order of February 24, 1998, neither party disputes the findings of fact of the IHO. The Administrative Law Judge has thus incorporated these findings, with some corrections urged by Appellant.[2] In addition, both parties have proposed additional findings of fact, some of which the Administrative Law Judge has incorporated. Based on her review of the transcript and exhibits, the Administrative Law Judge has further modified or added some findings to clarify the record in relation to the issues on appeal.

1. [redacted] is a 16-year old tenth-grader (date of birth March 5, 1982) whose disability is Attention Deficit Hyperactivity Disorder "ADHD").[2] At the time he entered tenth grade, [redacted] was 15.

2. Until September 1997, [redacted] resided with his family in their family home in Beulah, Colorado, a small mountain town approximately 30 miles west of Pueblo. [redacted], [redacted]'s mother, is a self-employed musician, "educator," and music therapist. [redacted], [redacted]'s father, is a self-employed musician, music therapist, and composer. Both parents are interested in the outdoors, hiking, and the environment. Both parents have invested a very significant amount of time and energy in [redacted]'s education and in seeking to meet his individual needs.

3. From birth up until approximately age 12, [redacted] had a history of depression, encopresis (a problem controlling bowel movements characterized by bowel impaction with leaking bowel and occasional fecal staining), severe sleep disorders, high frustration level, various learning disabilities, and episodes of rage. Most of these difficulties, except for the encopresis, have improved through treatment of chemical imbalances at the Carl Pfeiffer Treatment Center in Chicago.

4. [redacted] needs a highly structured, well-organized program. He is in need of no psychiatric care, except "crisis therapy." He has been successful in quite a number of areas in school.

5. Until the sixth grade, the [redacted] home schooled [redacted]. In sixth grade, however, the [redacted] enrolled [redacted] in the Connect School, a charter school within the District. At that time, [redacted] was well behind his grade level in most areas. [redacted] attended the Connect School for sixth, seventh and eighth grades.

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6. In seventh grade (1994), [redacted] was placed in special education. His disability at that time was identified as Perceptual Communicative Disorder ("P/C"). This is Colorado's terminology for a learning disability.

7. The Connect School has a no-fail policy, but [redacted]'s performance seemed to improve at the school.

8. **1996-97 School Year at Pueblo County High School.** At his father's request, [redacted] was removed from special education before he entered Pueblo County High School ("PCHS") as a ninth grader in September 1996.

9. At PCHS [redacted] was placed in the Choice Program, a program designed for students who do not excel in a traditional classroom setting. The Choice Program is a school within a school offering lower class sizes, curriculum integration, and more individualization of learning.

10. As a ninth grader at PCHS, [redacted] was failing his classes. The [redacted] became concerned and requested a special education staffing, which was held on October 25, 1996. [redacted]'s disability was determined to be P/C, although Mr. [redacted] did alert the District that [redacted] had been diagnosed with ADHD. The District understood that Mr. [redacted] preferred a P/C designation instead of an ADHD designation, and the District believed that it could provide [redacted] with the needed services based on this "label," since services are provided based on needs, not the designation of disability. Based on this 1996 IEP, some accommodations were made for [redacted]. [redacted] spent 1 ½ hours every other day with special education teacher Cherie Toussaint in the special education resource room. In addition, the IEP specified that levels were to be lowered in reading and written language tasks with respect to curriculum.

11. The goal of the Choice Program is to link together all material in the core classes, culminating at the end of the term in an Exhibition. Groups of three or four students select a topic and divide the subject into different aspects. During the Exhibition, each student then gives a presentation on the aspect of the subject he has chosen.

12. [redacted]'s Exhibition group chose the Gulf War. [redacted]'s part was to study the music of the period. [redacted] put little effort into the Exhibition and did very poorly. The exhibition is a large part of the student's final grades.

13. During the 1996-97 school year, [redacted] was never a discipline problem in any of his classes.

14. The [redacted] were concerned that [redacted] would be influenced by the "wrong kids." At the end of the first semester, when he should have been taking

a final examination, [redacted] went to a convenience store near the school. This incident reinforced his parents' concern.

15. [redacted]'s performance in the 1996-97 school year was mixed:

a. [redacted] had failing grades before he began receiving special education services and thereafter passed all his classes but one, although he had a number of low grades. A "D" is considered a passing grade at PCHS. For the first semester, [redacted] had two "B" grades, two "C" grades, and four "D" grades. In the second semester, he had two "C" grades, five "D" grades, and one "F" grade.

b. One of the short-term instructional objectives of the 1996 IEP was for [redacted] to turn in 100% of classroom assignments and homework with 70% accuracy. This objective was not met.

c. Appellant contends that many of [redacted]'s teachers did not lower levels in reading and written language tasks with respect to curriculum, as specified in the 1996 IEP. [redacted]'s regular education teachers did, however, require him to do less work. The record shows many instances when they accommodated [redacted]'s needs by reducing workload expectations and making other accommodations (*e.g.*, tests sent to Ms. Toussaint to administer orally, extra prompting in class to do assignments, allowing make-up of final examination missed when [redacted] went to convenience store, allowing extra time to do assignments, reducing the number of questions on an assignment, modification of oral directions in one-on-one interchange, explanation of assignment to [redacted]'s parents, and modifications of reading assignments).

d. Ms. Toussaint provided [redacted] with 1 1/2 hours of totally individualized education every other day in the special education resources room. Ms. Toussaint has a masters degree in special education, as well as an additional 15 to 20 hours for her special education certification. Ms. Toussaint helped [redacted] on tests, quizzed him on the plot of reading he had done to prepare him for an upcoming test, and provided math assistance. Either Ms. Toussaint or her aide was available to work with [redacted] at all times during this period. About 70% of the time, either she or the aide sat close to [redacted] to insure that he got his work done and to redirect him if he got off track. Ms. Toussaint used a daily planner with [redacted] to improve his organization, but he often left it at home. Ms. Toussaint obtained special teaching materials for [redacted] (*i.e.*, a transitional math book to help him with fractions, the computerized Josten's Learning Lab for individualized math skills, and simplified versions of Shakespeare works).

e. Ms. Toussaint met with Choice teachers once or twice a week to discuss [redacted].

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f. [redacted] was capable with modifications of doing the work assigned to him in the ninth grade at PCHS. Many of his teachers felt that he was able to comprehend the material if he put his mind to it. [redacted]'s main problems were a lack of effort and a failure to turn in his work. At times he simply socialized or daydreamed instead of doing his work. The record does not establish that this lack of effort is based on [redacted]'s disability.

g. [redacted] did not always turn in homework assignments, despite the efforts by his parents, his teachers, and particularly his special education teacher Ms. Toussaint. Mr. [redacted] attributed [redacted]'s failure to turn in his work to his disorganization, since [redacted] many times left for school with the completed homework in his backpack but the homework was then not turned in. Ms. Toussaint repeatedly sought to help [redacted] turn in his in-class and homework assignments. She first collected them herself and turned them into [redacted]'s teachers and then expected [redacted] to do this, with reminders and prompting from her.

h. [redacted] has made significant progress while enrolled in District schools, as reflected by his testing scores. While at the Connect School (for the 1 1/2 years after he began receiving special education services at the beginning of seventh grade), [redacted] showed significant improvement on his test scores, as shown by Stanford achievement tests of October 1994 and March 1996, although [redacted]'s scores remained quite low. Of even greater validity, however, is the comparison of individually-administered testing done in 1994 and August 1997. This testing showed improvement in grade equivalency in reading from 2.8 (*i.e.*, second grade, eighth month) to 8.1; mathematics from 4.8 to seventh grade level; and written language from 2.4 to 8.0. This represents dramatic improvement. As of August, 1997, [redacted] was functioning higher than would be expected based on his IQ.

16. [redacted] took a woodworking class his entire ninth grade year. Before the teacher permitted students to work on the machines, he required them to pass four safety tests. After [redacted] initially failed a test, the woodworking teacher sent the test, textbook, and answer key to Ms. Toussaint so she could help [redacted] in preparing for the tests. The woodworking teacher allowed [redacted] to take the tests when he was ready and then had Ms. Toussaint administer the tests. The exact timing of these modifications is unclear, but they began in the first semester sometime after the October 25, 1996 IEP staffing. [redacted] did not pass the tests until the fourth semester and was able to do only one woodworking project.

17. [redacted] failed his second semester career planning class and received a zero on the final exam. [redacted]'s teacher gave his second semester final examination to the special education department but never got it back. She also did not remember seeing [redacted]'s final "portfolio." The record does not establish whose responsibility it was to return [redacted]'s final examination to his career planning teacher or whether he completed a final portfolio.

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18. During his ninth grade year, [redacted] at times did not want to go to school.

19. Appellant has failed to establish that [redacted]'s mixed performance in 1996-97 reflects a District inability to provide him a FAPE in 1997-98.

20. **Mushroom Incident.** On May 14, 1997, [redacted] was arrested for allegedly selling hallucinogenic mushrooms and was suspended from school for eight days. It was later determined, however, that the mushrooms were not hallucinogenic. This mushroom incident occurred when a PCHS security officer received an anonymous note that [redacted] had mushrooms in his locker and was selling them for $8 a gram. The security officer and Assistant Principal Chris Gramstorff then took [redacted] to his locker and found a plastic baggy with mushrooms, which they suspected to be psilocybin mushrooms. [redacted] denied that the mushrooms were his. They then searched [redacted] and found eight $1.00 bills (consistent with the $8 alleged selling price of a gram) and a note with "$3, 584" (sic) written on it, which they concluded was an estimate of the amount of money [redacted] would obtain from selling all his mushrooms (including two pounds allegedly at his home) at $8 per gram. School officials then contacted the Pueblo County Sheriff Department, and [redacted] was arrested. School officials also conducted an investigation, in which at least one student indicated that other students had been at school under the influence of mushrooms supplied by [redacted] and had been unable to walk as a result.

21. The record does not reveal [redacted]'s exact conduct in the mushroom incident, although the parties appear to concede that he at least made a mistake in judgment in relation to the incident. [redacted] was not criminally prosecuted.

22. The record does not reveal whether [redacted] shared his PCHS locker with any other students. The record also does not establish whether the ingestion of hallucinogenic mushrooms could cause a person to be unable to walk.

23. Two PCHS assistant principals made inappropriate and insensitive comments in relation to the mushroom incident which engendered distrust of the District by the [redacted]:

a. In a meeting with Mr. [redacted] the day after [redacted] was suspended, Assistant Principal Runyon, in response to a question about the worst case scenario for [redacted], asked how [redacted] was doing that semester. When Mr. [redacted] responded that [redacted] was barely passing, Mr. Runyon indicated something to the effect that that was what he thought and stated that the worst case scenario was that [redacted] would lose that semester. He further stated that since [redacted] was not doing all that well, the loss of the semester would not be that big a deal.

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b. In a meeting with [redacted] before the mushrooms were found to be non-hallucinogenic, Assistant Principal Gramstorff indicated that he would bet his next paycheck that the lab results would indicate they mushrooms were hallucinogenic.

24. A manifestation hearing regarding [redacted]'s participation in the mushroom incident was held on May 21, 1997. The purpose of the manifestation hearing was to determine whether [redacted]'s conduct was a manifestation of his disability. It was found to be a manifestation of his disability. As a result, the suspension was lifted and no expulsion ordered. In addition, the District and the [redacted] jointly agreed that [redacted] would receive homebound instruction until the end of the semester instead of returning to PCHS at that time.

25. Dr. Susan Middleton, the psychiatrist who diagnosed [redacted] with ADHD in 1984, speculated that [redacted]'s not being allowed to return to PCHS after the mushroom incident might be frustrating for him and induce him to drop out. Dr. Middleton had not discussed [redacted]'s reaction with him, and her speculation is an insufficient basis to determine [redacted]'s actual reaction.

26. At the manifestation hearing, either Mr. or Mrs. [redacted] indicated that they were considering enrolling [redacted] at Eagle Rock School for the coming year. The District concluded that if [redacted] was going to return to PCHS, he should be reassessed. On May 22, 1997, Greg Keasling, Director of Special Education for the District, sent a Notice of Re-Assessment Form to the [redacted]. The District proposed performing a battery of assessments on [redacted] and sought his parents' permission to do so. The [redacted] agreed to the re-assessment but specified that it would need to wait until after the end of the school year due to [redacted]'s stress level (resulting from the suspension and other matters) and his planned participation in an Outward Bound experience in the early summer. The [redacted] request in this regard was reasonable.

27. **Reassessments and 1997 IEP.** [redacted] attended Colorado Outward Bound School until July 6, 1997. [redacted]'s instructors gave him glowing reports in every category, including leadership, team spirit, communication, ability to set goals and see them through, positive attitude, curiosity, self-denial, and compassion.

28. In mid-July Mr. [redacted] contacted Mr. Keasling to indicate that [redacted] was ready for the tests. Mr. Keasling's office responded that the staff would not be back until August to administer the tests but would do so then. The District actually completed comprehensive re-assessments of [redacted] sometime on or after August 27, 1997. The District then scheduled an IEP staffing meeting for September 3, 1997, the second day of the 1997-98 school year.

29. By the time of the September 3, 1997 IEP staffing, the [redacted] had virtually decided that they would enroll [redacted] at The Meeting School ("TMS"), a

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residential school located in New Hampshire. The Administrative Law Judge makes this finding based on the following:

a. Sometime before July 25, 1997, [redacted] applied to TMS. On August 17, 1997, [redacted] had an interview with faculty and non-returning students from TMS, a requirement for students seeking admittance.

b. In late August 1997, Mrs. [redacted] told Ms. Walters, [redacted]'s ninth grade science teacher, that they had tried to get [redacted] into Eagle Rock School, that he was not accepted, that they found a wonderful school for him back East, that unfortunately it cost a lot of money, and that she was going to try to get the District to pay for some of it.

c. Mr. [redacted] testified that while he had not already decided to send [redacted] to TMS before September 3, 1997, he was leaning really heavily toward it; that he had a feeling prior to the staffing that [redacted] would go to TMS; that he was trying to keep his mind open to District suggestions, despite the bad taste in his mouth from the year before; and that he was hoping to tell the District at the staffing that he felt TMS would be appropriate for [redacted].

d. Although she testified that they had not decided to enroll [redacted] at TMS before the September 3, 1997 staffing, Mrs. [redacted] told the District's attorney before that staffing that they were sending [redacted] to school in New Hampshire.

e. At the September 3, 1997 staffing, the [redacted] requested for the first time that [redacted] be placed at TMS. It is appropriate in an IEP staffing to identify the student's needs, identify goals and objectives, and then determine a placement. The [redacted] viewed the IEP meeting as an opportunity to convince the District that TMS was the appropriate placement for [redacted]. They sought to short circuit the procedure of determining [redacted]'s needs, goals and objectives. They were more focused on convincing the District that TMS was the only appropriate placement than designing a program with the District. They appeared to have already decided to send [redacted] to TMS.

30. The September 3, 1997 IEP staffing was a brainstorming session in which three main alternatives were discussed for [redacted] for his tenth grade year. These alternatives included full-time placement in the special education resources room; a combined placement at the Tech Academy, a special program within the District, and the Choice Program; and continuation of the Choice Program with special education support. These options were not finalized.

31. The IEP meeting recessed when the [redacted] felt their concerns were not being addressed and decided that the District did not have a program that offered [redacted] what he needed. They indicated that they were going to pursue due

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process. The staffing resulted in no written IEP, nor did the staffing team select one of the three alternatives discussed. The District took the position at that time that [redacted]s 1996 IEP would remain in place until the due process procedure was completed.

32. The idea of placing [redacted] at the Tech Academy arose for the first time at the September 3, 1997 IEP staffing, when PCHS Principal Dick Amman learned that [redacted] was interested in computers. The District had thus not finalized any proposal in this regard. Immediately following the IEP staffing, he District did not pursue the mechanics of [redacted]s possible placement at the Tech Academy, because it understood that the [redacted] were not interested in this possibility. The day after the staffing, Mr. [redacted] telephoned Kent Muckel, the director of the Tech Academy, who told him that tenth graders were not accepted, it was a rigorous program, and it would be very difficult for a special education student.

33. At the time of his discussion with Mr. [redacted], Mr. Muckel had not discussed [redacted]'s possible placement with Mr. Keasling. After doing so, Mr. Muckel concluded that [redacted]'s placement in selected courses could be successful. There are other special education students at the Tech Academy who have been successful. In addition, the Tech Academy had begun allowing students to mix and match courses there and at PCHS. The Tech Academy is good for students who like science, provides hands-on learning, includes field trips, and allows students to work at their own pace. In addition, teachers are available to provide extra help to students. The Tech Academy can also accommodate a reduced load for particular students.

34. At some point the District decided to complete a 1997 IEP for [redacted] instead of simply relying on the prior IEP until due process procedures were completed. The District scheduled a continued staffing for October 28, 1997. The [redacted], however, were not available at this time and further requested that the District delay the staffing until after the due process hearing. The District declined this request and rescheduled the staffing for November 6, 1997.

35. The IEP staffing reconvened on November 6, 1997, after which an IEP was prepared for [redacted]. The [redacted] requested that [redacted] be identified as Other Physical Disability due to his ADHD, and the staffing team agreed with this designation of his disability. The 1997 IEP calls for a combination of classes at the Tech Academy, Choice Program, and special education resources room, with one period for field experiences and work study.[4] [redacted] was to take all courses except Band and Physical Education at the Tech Academy. [redacted]'s main course would be Computer Assisted Drafting, and he would also take Biology and Tech Lab I, a science credit. [redacted] also would be involved in some tours such as of a fish hatchery. One particular field trip discussed was to the Bureau of Land Management ("BLM"), which is approximately one hour's drive from PCHS. All [redacted]'s District

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teachers would be certified by Colorado. In addition, his special education teacher would be certified in special education.

36. The particular mix of Tech Academy classes and PCHS classes described in [redacted]'s 1997 IEP has never been done before. PCHS and the Tech Academy are only a 10-minute drive apart.

37. The [redacted] requested no program, services, addition or deletion from the IEP developed on November 6, 1997[5/] but ultimately decided not to sign it because they felt TMS was a more appropriate placement. According to Mr. [redacted] the 1997 IEP as written was "terrific," but he doubted the District's ability to deliver.

38. Mrs. [redacted] testified at hearing that nothing could be added to the 1997 IEP to make it more appropriate other than placement at TMS. Mrs. [redacted] like her husband, takes issue with the District's ability to accomplish the program outlined in the IEP. Based on the September 3, 1997 IEP staffing, Mrs. [redacted] was also concerned about the amount of travel and the feasibility of the field trips. At the November 6, 1997 IEP staffing, however, the [redacted] did not raise this issue of the amount of travel being too stressful for [redacted]

39. Several District witnesses testified that the District has the ability to deliver the services outlined in the IEP and that these services will provide educational benefit to [redacted] The Administrative Law Judge so finds.

40. The record does not establish that [redacted] needs a residential placement to meet his needs.

41. **The Meeting School.** On September 5, 1997, the [redacted] enrolled [redacted] at TMS, and he began the school year there on September 14, 1997. TMS is a residential school located on a farm in rural New Hampshire. TMS does not consider a "D" to be a passing grade and thus did not give [redacted] credit for a number of courses he took in his freshman year at PCHS.

42. At the time of [redacted]'s enrollment, there were eleven students at TMS, all of whom live in the homes of faculty members and their families. The students attend very small classes, sometimes held in a home, and must help with work around the farm, such as moving the sheep and digging cesspools.

43. TMS is organized on a trimester basis with a five-week off-campus intersession for students to investigate a topic of their choice. At the time of the hearing before the IHO, [redacted] had competed almost the entire first 9-week trimester. During the first trimester at TMS, [redacted] took three classes: Persuasive Writing, Algebra I, and Wellness. He had both Persuasive Writing (1 1/2 hours) and Wellness (1 1/2 hours) during the morning and Algebra I (1 hour) in the afternoon. In

the afternoons [redacted] also participated for four hours a week in work study such as moving sheep, shoveling manure, and other farm work under the tutelage of TMS teacher, a Ph.D. biochemist from Massachusetts Institute of Technology, or did sports.

44. [redacted] had homework in Persuasive Writing, only occasional homework in Algebra I, and homework only once in Wellness.

45. None of the teachers at TMS is qualified in special education or certified by New Hampshire. TMS does not focus on or specialize in educating children with disabilities. Although four students at TMS have disabilities (mild emotional/social and mild ADD), [redacted] is the only student at TMS who had an IEP at a prior school. TMS is not tutorial or remedial.

46. The record does not establish that [redacted]'s teachers understand his disability, have made appropriate modifications for it, or have any training or background in dealing with children with ADHD. TMS has no formal plan for accommodating [redacted]'s individual learning needs.

47. [redacted] benefits from the individual attention available in the small classes at TMS. His Persuasive Writing class has three students; his Algebra class, two students; and his Wellness class, seven students.

48. The record is insufficient to establish that [redacted] has progressed educationally at TMS. At the time of the hearing before the IHO, [redacted] had received midterm status reports in each of his three classes. The record contains only anecdotal impressions of [redacted]'s asserted progress, unsupported by records or assessment tools:

a. [redacted]'s Algebra I teacher Dawn Ashbacher relies heavily on [redacted]'s completing work sheets and taking tests at the end of each chapter in the textbook, which [redacted] must pass with an 80% to move on to the next chapter. At the time of the hearing before the IHO, [redacted] had passed two chapter tests. Ms. Ashbacher keeps no file of [redacted]'s work or record of his performance on chapter tests but knows that he must have had an 80% or better to advance to the next chapter. [redacted] must score an 80% on a competency test in order to receive credit for the class, but he had not yet taken the competency test at the time of the hearing. On the midterm status report, Ms. Ashbacher rated [redacted] as making steady progress and noted that he understood the algebraic concepts but needed repeated practice to remember them.

b. In [redacted]'s Persuasive Writing class, he spent 15 minutes each day in "free writing," did some spelling work sheets or grammar assignments, and presented a ten-minute oral presentation weekly on grammar or writing. [redacted] also completed two to three short summaries of articles and three short essays; two-thirds of a grammar text, and all but two chapters of a spelling book. His teacher Christine Dunford reviewed and returned these writing alignments. She kept no record of how [redacted] did on assignments. She testified that she had noticed improvement, that [redacted] was doing great, and that he was a slow learner. Ms. Dunford further indicated that [redacted] was well prepared for class, focused well in class, and excelled with the TMS writing curriculum.

c. Wellness is a hands on class where students primarily learn to plan and prepare balanced meals. Rose Johnson, [redacted]'s Wellness teacher, indicated on his midterm status report that he was doing very well in class, was prepared, and participated fully. Ms. Johnson did not testify at the hearing.

49. [redacted] has adapted well to TMS community and is considered a valuable member of that community. [redacted] likes the relaxed atmosphere at TMS and testified that he has learned a lot about, for example, cooking food, getting along with the community and solving problems with people. [redacted] did not mention any academic subjects in the context of what he was learning at TMS.

50. **Encopresis.** The 1997 IEP contains no plan for dealing with [redacted]'s encopresis.

51. The record does not establish that the issue of [redacted]'s encopresis was raised at either the September 3, 1997 or November 6, 1997 IEP staffing. While Mr. [redacted] testified in a general fashion that he recalled bringing it up at "staffings," Mr. Keasling testified that it was not raised. In addition, the [redacted] made no request at the November 6, 1997 IEP staffing regarding [redacted]'s encopresis. Mr. [redacted] clearly considered this a problem which [redacted] needed to resolve himself,[8] and thus no needs which [redacted] may have had regarding his encopresis were raised.

52. PCHS has some bathrooms which do not have walls affording privacy. [redacted] sometimes takes a long time when he has a bowel movement.

53. The record contains no evidence regarding any plan by TMS to handle [redacted]'s encopresis, any awareness by TMS of any needs in this regard other than an understanding that he has an intestinal problem, or any bathroom privacy at TMS.

54. The District first learned of the [redacted] concern about [redacted]'s encopresis needs at the hearing before the IHO.

55. **Fear and Distrust.** Appellant asserts that after the 1996 IEP was written, he and his parents developed a factually founded, substantial fear and distrust of the District's willingness to fulfill the proposed IEP and that this interfered

with his ability to obtain educational benefit from the District. The record does not support this claim. Appellant relies on the following:

a. The [redacted] were concerned that [redacted] would get in with the "wrong kids" and become a drug addict.[7] This concern increased when [redacted] went to the convenience store rather than taking a final examination and when he was involved in the mushroom incident. The record contains very little information about [redacted]'s actual conduct in either incident. The record does not establish that this concern amounted to a fear so strong that it would impede [redacted]'s ability to receive educational benefit from the District or that the concern was specific to a District placement.

b. Mr. [redacted] was frustrated at the manifestation hearing because District personnel continued to believe that [redacted]'s placement was appropriate.

c. The [redacted] did not have confidence in the District based on [redacted]'s "mixed results" during his year at PCHS.

d. [redacted] did not "trust" his teachers, although he liked them. In contrast, he can trust his TMS teachers to stay set on assignments or on not doing assignments and not to always change their mind about things. The record does not establish how [redacted] was using the term "trust" other than to refer to the absence of teachers' changing their minds about assignments and other issues.

e. Mr. [redacted] reacted negatively to the comments of Mr. Runyon and Mr. Gramstorff regarding the mushroom incident.

DISCUSSION AND CONCLUSIONS OF LAW

I. Scope of Review

Pursuant to the Individuals with Disabilities Education Act ("IDEA"), the Exceptional Children's Educational Act, Sections 22-20-101 to 116, C.R.S. ("ECEA"), and the State Plan of the Colorado Department of Education, Fiscal Years 1995-97 ("State Plan"), the Administrative Law Judge must conduct an impartial review of the IHO's decision and make an "independent" decision on state level review. 20 U.S.C. §1415(c); 34 C.F.R. §300.510; State Plan, Part II, A, VII, B, 9, b; and 2220-R-6.03(11)(b)(v) (1 CCR 301-8). The Administrative Law Judge must give "due weight" to the findings at the state level. *See Murray v. Montrose County School District*, 51 F.3d 921, 927 (10th Cir. 1995), *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982); *Burke County Board of*

Education v. Denton, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990).

II. Legal Background

Pursuant to the Individuals with Disabilities Education Act ("IDEA"), states must provide each disabled child with a free appropriate public education through the development and implementation of an Individualized Education Program ("IEP"). 20 U.S.C. § 1412. A free appropriate public education is one which is "reasonably calculated to enable the child to receive educational benefit." *Board of Education v. Rowley,* 458 U.S. 176, 188-89 (1982). IDEA does not require a school district to provide a perfect or ideal education to students with disabilities, but the educational program must be reasonably calculated to allow the child to achieve passing grades and advance from grade to grade. *Board of Education v. Rowley, supra*; *Lenn v. Portland School Committee,* 98 F.2d 1083 (1st Cir. 1993) [FAPE need not provide educational benefit to highest attainable level; no entitlement to residential placement permitting child to reach full potential]; *Doe v. Board of Education of Tullahoma City Schools,* 9 F.3d 455 (6th Cir. 1993) [FAPE does not require school district to pay for tuition at private school which would provide superior services so long as proposed IEP is reasonably calculated to enable child to receive educational benefits]; *Kerkam v. Superintendent D.C. Public Schools,* 931 F.2d 84 (D.C. Cir. 1991) [when public school offered an appropriate education, it need not reimburse parents for unilateral enrollment in private school which confers greater education benefit]. *In accord Hampton School District v. Dobrowolski,* 976 F.2d 48 (1st Cir. 1992). The educational benefit conferred must be meaningful and not trivial or *de minimis. Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171, 184 (3rd Cir. 1988). The IEP is the primary vehicle for delivering appropriate educational services to children with disabilities. *See Honig v. Doe,* 484 U.S. 305, 311 (1988).

If a school district fails to provide FAPE to a child with a disability, the child's parents may unilaterally place the child in an appropriate non-public school and request tuition reimbursement from the school district. Parents make a unilateral placement "at their own financial risk." *Burlington School Committee of the Town of Burlington v. Department of Education of Massachusetts,* 471 U.S. 359 (1985).

A school district is not required to pay for a child's education at a private school or facility if it has offered him a FAPE. 34 C.F.R. § 403. In order to prevail in this matter, the Appellant bears the burden of proving both that the District did not offer a FAPE to [redacted] and that the private placement chosen, TMS, is appropriate under the IDEA. *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir. 1986). As a threshold matter, if the District has offered a FAPE to [redacted], he cannot prevail on his claim for reimbursement of his TMS expenses.

III. Appropriateness of District Placement

1. Timeliness of IEP. Appellant asserts that the IEP developed on November 6, 1997, was untimely. Appellant apparently concedes that if the IEP had been finalized on September 3, 1997, it would have been timely. Since it was not finalized until November 6, 1997, however, Appellant argues that it essentially denied him two months of an effective education such that this procedural violation amounts to a denial of a FAPE.[8]

The IHO found that the delay in the development of the IEP was attributable to the [redacted]. This is certainly true for the time period until mid-July, when Mr. [redacted] consented to the reassessment testing of [redacted] The relevant time period, however, is the two-month delay from September 3, 1997 (essentially the beginning of the school year) to November 6, 1997. The [redacted]' reasonable request for a delay until mid-July did not affect the District's ability to prepare an IEP before November 6, 1997.

Appellant asserts two grounds for his claim of untimeliness. First, he claims that ECEA regulations impose either a 30-day or 45-day requirement for developing the IEP. Second, he asserts that an IEP must be developed within a reasonable time. The Administrative Law Judge finds the ECEA regulations inapplicable to a reassessment but concludes that the November 6, 1997 IEP was not developed within a reasonable time.

Appellant cites ECEA Rule 2220-R-4.05(1), 1 CCR 301-8, to support his contention that his IEP had to be developed within school 45 days after the May 21, 1997 manifestation hearing or within 30 days after September 3, 1997 IEP staffing. Rule 2220-R-4.05(1) provides as follows:

> 4.05(1) Timeliness for Meetings.
>
> > 4.05(1)(a) If a child is determined to have a disability, an IEP shall be developed within 45 school days of the date of the special education referral.
> >
> > 4.05(1)(b) If separate meetings are held for the determination of disability and the development of an IEP, the meeting to develop the IEP must be held within 30 calendar days of the determination that the child has a disability and is in need of special education services. This must, however fall within the 45 school day time line.

Appellant contends that the "special education referral" in Rule 2220-R-4.05(1)(a) was May 21, 1997 (the date of his manifestation hearing at which a recommendation for reassessment was made) and that thus the IEP had to be developed within 45 school days after that date. The decision to conduct reassessments at a manifestation hearing, however, cannot be considered a "special education referral." The 45-school day time line for IEP development clearly applies to the initial development of an IEP and not reassessments such as [redacted]'s.

In addition, Appellant contends that pursuant to Rule 2220-R-4.05(1)(b), separate meetings were held to determine his disability and to develop the IEP; that the first meeting occurred on September 3, 1997; and that thus the IEP was due by October 3, 1997. This characterization of the September 3 and November 6, 1997 IEP staffings is inaccurate. The language of Rule 2220-R-4.05(1)(b) likewise addresses the initial development of an IEP, not a planned reassessment. These ECEA regulations thus establish no time line for the issuance of a 1997 IEP for [redacted].

Nonetheless, it is clear that in order for the requirement of a FAPE to be effective, an IEP must be developed within a reasonable time after a determination is made that a child should be reassessed. In addition, even when parents express an unwillingness to accept a proposed placement, IDEA requires the District to make a formal, written offer of an educational program through an IEP. *Christen G. v. Lower Merion School District,* 23 IDELR 813 (PA 1996); *Union School District v. Smith,* 15 F.3d 1519, 1526 (9th Cir. 1994). Not only does such a formal IEP create a clear record of what a school district is offering but it assists parents in pursuing their objections to the proposed placement. *Id. See* 20 U.S.C. § 1415(b)(1)(E).

Under the circumstances of this case, the District failed to develop an IEP for the 1997-98 school year within a reasonable time. The District had already determined that [redacted] should be reassessed in order to accommodate his needs if he returned to PCHS for his sophomore year. The November 6, 1997 IEP, which provides an educational program different than that specified in the 1996 IEP, substantiates the District's conclusion that [redacted] needed a different educational program than provided under the 1996 IEP. The District delayed in developing that IEP for two months, such that it was not available until approximately one-quarter of the school year had lapsed. The District offered no explanation for this delay. The Administrative Law Judge's conclusion that the District's two-month unexplained delay in formulating the IEP is untimely is also supported by 34 C.F.R. § 300.342, which provides that an IEP must be in effect at beginning of each school year.

Not every procedural violation of IDEA, however, results in the denial of a FAPE. Procedural noncompliance with IDEA only denies a child a FAPE if it results in a substantial deprivation. *Urban by Urban v. Jefferson County School District R-1,* 870 F. Supp. 1558, 1567 (D.Colo. 1994). Serious and harmful procedural errors by a school district can certainly lead to a determination that the district failed to provide the child with a FAPE. *See In Re Child with Disability*, 507 EHLR 144 (SEA IL 1985). In the case at hand, however, even though the 1997 IEP was untimely, the delay in its issuance did not deny [redacted] a FAPE.

Since the [redacted] had essentially decided that the District was unable to provide any program to [redacted] which would provide him a FAPE and had for all intents and purposes determined to send him to TMS, the District's failure to issue an IEP at the time of the September 3, 1997 staffing did not deprive [redacted] of appropriate education for two months, as he claims. In fact, the [redacted] understood the options being offered by the District, rejected them, and chose instead to enroll [redacted] at TMS just two days later. In addition, the [redacted] requested an additional delay in the development of the 1997 IEP until after the due process procedures were completed. They clearly evidenced no need or desire for the IEP. Under these circumstances, the untimely 1997 IEP did not deny [redacted] a FAPE.

2. IHO's Consideration of Progress Toward 1996-97 IEP Goals in Determining Appropriateness of November 6, 1997 IEP. During oral argument, Appellant contended that this ground for appeal encompassed two separate contentions regarding the appropriateness of the 1997 IEP. First, Appellant argued that the 1997 IEP is deficient because it does not address or contain any plan for dealing with [redacted]'s encopresis. Second, Appellant argued that it is deficient because the District lacks the capacity to deliver the program offered.

a. Encopresis. Appellant contends that the 1997 IEP should have addressed [redacted]'s needs regarding his encopresis. While Appellant did not specify the exact parameters of those needs at hearing, he apparently contends that at a minimum he needs bathroom privacy for bowel movements.

The record is insufficient to establish any failure on the part of the District to address this issue. The record does not establish that any need of [redacted]'s relating to his encopresis was even identified at the two staffings leading to the 1997 IEP. Rather, Mr. [redacted] believes that [redacted] himself, not the District, needs to figure out a way to deal with this problem. In addition, the record contains no evidence that TMS has developed an appropriate plan for dealing with [redacted]'s encopresis. The [redacted] have chosen to provide very little information to TMS regarding this problem (*i.e.*, they have told only Ms. Dunford that [redacted] has an "intestinal problem"). There was no evidence regarding bathroom privacy at TMS. Appellant has failed to demonstrate any 1997 IEP deficiency based on a failure to address his encopresis needs.

b. District Capacity to Fulfill 1997 IEP. Appellant claims that the 1997 IEP does not offer him a FAPE because the District does not have the capability to deliver the program being offered. Appellant cites his alleged lack of progress during the prior school year and the infeasibility of providing him field trips which require longer transportation times. Essentially Appellant argues that the District did not effectively implement the 1996 IEP, that consequently he did not progress, and that the District's dismal "track record" is predictive of its inability to provide the program set forth in the 1997 IEP. Thus, even if the 1997 IEP satisfies the requisites of IDEA, Appellant asserts that the District's placement is inappropriate.

Appellant similarly argues that the IHO erred in summarily dismissing this argument by finding that his enrollment at TMS precluded a determination of the District's ability to deliver the services outlined in that IEP and thus whether it was appropriate. The Administrative Law Judge agrees that Appellant's arguments regarding the District's capability to fulfill the 1997 IEP, which rely on District actions in the past and asserted inherent problems of that IEP, can be resolved despite [redacted]'s enrollment at TMS and thus addresses them here.

A student's progress toward IEP goals provides a means of assessing the appropriateness of a school district's placement and program. A special education program which results in only minimal academic advancement is not appropriate. *Carter v. Florence County School District Four,* 950 F.2d 156 (4th Cir. 1991), *aff'd* 510 U.S. 7 (1993); *Hall v. Vance County Board of Education,* 774 F.2d 629, 636 (4th Cir. 1985).

Appellant has failed to establish that his limited progress during the 1996-97 school year reflects a District inability to provide him a FAPE in 1997-98. Appellant relies on several factual assertions. First, he cites the fact that his 1996 IEP specified that levels were to be lowered in reading and written language tasks with respect to curriculum. Appellant claims that this was not done in a woodworking class involving four written safety tests, which he had to take several times before he passed them. Appellant asserts that he would have been able to complete more woodworking projects had the tests been modified earlier. Since the record does establish modifications in this class and does not establish the timing of those modifications, Appellant's argument must fail.

Second, Appellant cites the fact that he failed his career planning class and received a zero on the final exam. [redacted]'s teacher gave his second semester final examination to the special education department but never got it back. She also did not remember seeing [redacted]'s final "portfolio." Since the record contains no explanation for how the final examination was handled or the specifics regarding the portfolio, if one was completed, [redacted]'s performance in this class does not demonstrate a District unwillingness or incapacity to fulfill the 1997 IEP.

[redacted]'s achievement during his freshman year at PCHS was indeed mixed. [redacted] did not fully meet the goals and objectives of his 1996 IEP(*e.g.,* 100% of his work with 70% accuracy). Although he passed all but one of his classes, he did so with grades in his core academic subjects which were so low that he did not receive credit when he transferred to TMS. On the other hand, [redacted]'s test scores generally from the time he entered the District in sixth grade through ninth grade show very significant progress in all areas.

At hearing, the parties asserted different reasons for [redacted]'s mixed performance during the 1996-97 school year. Appellant asserted that it was a lack of organization due to his disability and a District inability to provide services. The District asserted that [redacted] chose not to make the effort to succeed at school, though he was capable of doing so. The record establishes a lack of effort on [redacted]'s part which did hinder his progress. This lack of effort was seen both in his regular classroom work and in his Exhibition. The record does not establish that this lack of effort is based on [redacted]'s disability. [redacted] was generally capable of doing the work expected of him, with modifications. He did not, however, put forth the effort to accomplish that work.

A student's limited progress in a particular year does not in and of itself demonstrate that the District is incapable of providing him a FAPE in the following year. A school district can rectify mistakes or failures in future years. In fact, the District responded to [redacted]'s ninth grade performance by ordering comprehensive reassessments and changing his IEP. [redacted] has failed to establish that his progress in the 1996-97 year was such that it is more likely than not that the District would be unable to fulfill the educational program offered in the 1997 IEP. Further, the mere fact that one possible field trip discussed at the IEP staffing (*e.g.*, the BLM trip with an hour's drive) may involve a long travel time and could turn out to be infeasible does not prove that the District would be unable to deliver the field trips offered.

3. Effect of Van Manens' Alleged Fear and Distrust on Educational Benefit [redacted] Could Receive. Appellant contends that the IHO erred in failing to recognize the impact of [redacted]'s and the [redacted]' alleged fear and distrust of the District on the educational benefit he could receive at a District school. Appellant contends that [redacted] and his parents have a factually founded, substantial fear and distrust of the District's willingness to fulfill the proposed IEP.

In support of his position, Appellant cites *Greenbush School Committee v. Mr. and Mrs. K.*, 25 IDELR 200 (MN 1996) [parental hostility, belief child unfairly ostracized and persecuted by educators, and student's "gripping fear" among reasons student would receive no educational benefit] and *Board of Education of Community Consolidated School No. 21 v. Illinois State Board of Education*, 938 F.2d 712, 716 (7th Cir. 1988) [consideration of parental hostility to proposed placement and extremely adversarial relationship between parents and school district proper in analyzing potential education benefits]. In both cases, parental attitudes were so severe that they essentially doomed any attempt to educated the children in the school district. Such attitudes must be distinguished from the normal attitudes held by parents in a due process setting, who obviously disagree with the school district.

Appellant asserted that both he and his parents have a deeply rooted distrust of the District based on the District's handling of the mushroom incident leading to his suspension and based on his limited progress in the 1996-97 school year. Appellant contends that Mr. Gramstorff was too quick to conclude that he was selling hallucinogenic mushrooms. First, Appellant alleges that he shared his locker with another student. The record does not substantiate this assertion. Second, Appellant correctly asserts that if he had two pounds of mushrooms at home and was selling them for $8 per gram, the resulting value would exceed $7,000 and not approximate the $3,584 figure contained in the anonymous note. The mathematical inconsistency regarding the $3,584 figure, given the other evidence regarding the mushroom incident, is insufficient to conclude that Mr. Gramstorff inappropriately concluded that the mushrooms were hallucinogenic or inappropriately reported the incident to the Sheriff's office. In fact, had Mr. Gramstorff relied on this one mathematical inconsistency to dispel any suspicion of [redacted] and proceeded to ignore the anonymous note, he may have been derelict in his duty. Third, Appellant asserts that a hallucinogenic mushroom allegedly sold by [redacted] would not cause a student to be unable to walk, as reported by to school officials. The record does not contain any evidence to support this assertion.

Appellant's assertion of a factually-founded, substantial mistrust of the District based on the statements of Mr. Gramstorff (that he would bet his paycheck that the mushrooms were hallucinogenic) and Mr. Runyon (that if [redacted] failed it was not a big deal since his grades were so low) is also without support. These comments were clearly insensitive, as Appellant asserts, but they did not give rise to a mistrust of the District so strong that it precluded [redacted] from receiving a FAPE. In addition, the [redacted] reaction to [redacted]'s mixed success in his freshman year at PCHS was not so severe that it affects [redacted]'s ability to receive an appropriate education from the District. Likewise, it is not clear how Mr. [redacted]'s fear that [redacted] would succumb to peer pressure and become drug addict or drop out affects [redacted]'s ability to receive a FAPE from the District.

The record in this matter does not establish the type of severe attitudes on the part of either [redacted] or his parents which would pose a real threat to the success of the 1997 IEP. In relation to [redacted], the record establishes that he at times did not want to go to school, that he liked his PCHS teachers but did not "trust" them not to change their minds about things, and that he was stressed by the mushroom incident, although it is not clear that this reaction was a consequence of the way the District handled that incident.[9] In relation to the [redacted], the record establishes that Mr. [redacted] reacted negatively to the comments of Mr. Runyon and Mr. Gramstorff, that the [redacted] did not have confidence in the District to carry out the 1997 IEP program, and that they disagreed with the District on the appropriateness of [redacted]'s 1996 and 1997 IEPs. This level of distrust is a far cry from that described in *Greenbush School Committee v. Mr. and Mrs. K., supra*, or *Board of Education of Community Consolidated School No. 21 v. Illinois State Board of Education, supra.*

IV. Appropriateness of Placement at TMS

Since the Administrative Law Judge concurs with the IHO that the District offered [redacted] a FAPE, Appellant has failed to meet the first of two prerequisites to any District obligation to reimburse Appellant for the costs of TMS. While it is not therefore necessary to address the second prerequisite (*i.e.*, whether TMS is appropriate for [redacted]), the IHO addressed this issue and it was raised on appeal. The Administrative Law Judge thus addresses the issue of the appropriateness of the TMS placement for [redacted].

The IHO found that [redacted]'s placement at TMS was not appropriate because it was not the least restrictive environment and there was no evidence that [redacted] was benefitting educationally. In reaching the latter conclusion, the IHO relied on the "woefully inadequate" quality of educational benefits being offered by TMS to [redacted], the lack of evidence to determine whether [redacted] was progressing in Persuasive Writing and Algebra, and the lack of qualifications of his teachers (who are not qualified in special education or state-certified).

1. **Educational Benefit to [redacted].** Appellant contends that he is benefitting educationally from TMS due to the small class size and individual instruction in a community setting. As addressed in the Findings of Fact, however, Appellant has failed to establish that he is benefitting educationally from TMS. [redacted]'s teachers at TMS are not qualified in special education. In addition, the record does not establish that they understand his disability or make appropriate modifications for it. The anecdotal assertions of [redacted]'s teachers that he is progressing are insufficient given the lack of record-keeping and assessment instruments. While [redacted] has the benefit of small class size and individual instruction, it is not clear that these benefits have translated into educational progress.

2. **Certification of TMS Teachers.** Appellant argues that the IHO erred in concluding that the educational program at TMS was not appropriate because the teachers were not certified in special education and because it was not an approved school. Appellant concedes that such factors may be considered but believes that they were dispositive in the IHO's final order.

In order for the parents to be reimbursed when they unilaterally place their child in a private school, the private school need not employ certified teachers, if it otherwise provides a FAPE. *Florence County School Dis. Four v. Carter, supra* [neither state approval of private school nor certification of teachers a prerequisite to school district reimbursement]; *Christen G. v. Lower Merion School District, supra* [reimbursement awarded for placement at uncertified school whose teachers generally not certified as special education teachers]; *Western Wayne School District*, 25 IDELR 867 (SEA PA 1997) [lack of private school approval does not prevent reimbursement to parents when school is licensed and meets child's needs]. As conceded by the parties, the IHO could consider this factor. *P.J. v. State of Connecticut Board of Education,* 788 F. Supp. 673 (D.Conn. 1992).

The IHO did not, as Appellant asserts, find that TMS was not an approved school or rely on this conclusion. The Administrative Law Judge likewise has made no such finding. Appellant's appeal on this ground is thus without merit. The IHO did, however, rely on the fact that TMS teachers are not certified by the State of New Hampshire or qualified in special education. Nothing in the Final Order suggests that this was the sole factor used by the IHO, nor does the Administrative Law Judge rely exclusively on certification status. The Administrative Law Judge has, however, found, as the IHO did, that [redacted]'s teachers are not qualified in special education. This is a significant finding in relation to a determination of the appropriateness of [redacted]'s education at TMS.

3. **Application of Residential Treatment Law.** Appellant contends that the IHO erred in applying the law relating to residential treatment placements in determining that TMS is not the least restrictive environment, as required under IDEA. The IHO did indeed cite *Doe v. Board of Education of Tullahoma City Schools, supra,* and *Blickle v. St. Charles Community United School District No. 303,* 20 IDELR 167 (1993). The facilities addressed in *Doe* (an out-of-state private school where all students are learning disabled, handicapped children) and *Blickle* (a residential treatment facility providing a 24-hour therapeutic setting) are very different from TMS, a residential boarding school. TMS educates students both with and without disabilities and provides a non-segregated setting.

The IHO relied on *Doe* and *Blickle* for the propositions that mainstreaming is required to the maximum extent appropriate; that some handicapped children must be educated in segregated facilities; and that in considering a residential placement, an individual determination must be made that the student's needs are so profound or unique that they cannot be met in a less restrictive placement. While TMS is factually distinguishable from the residential placements considered in *Doe* and *Blickle*, the IHO's reliance on these decisions was not misplaced. The preference for a less restrictive environment and the requirement that a more restrictive environment must be substantiated as appropriate apply irrespective of the type of residential facility involved.

Appellant concedes that under IDEA and ECEA, there is a preference for children to be educated in their neighborhood school and to be mainstreamed. 20 U.S.C. 1412(5), 34 C.F.R. 300.552, Rule 2220-R-5.02(3) and (4)[rationale for placement outside home school and outside regular classroom must be based on student's needs and documented in IEP]. Appellant concedes that a residential placement is generally a more restrictive environment than a neighborhood school. Appellant argues only that this preference should not be enforced in circumstances when the student will not receive educational benefit at his local school. *See Christen G. v. Lower Merion School District, supra; Greenbush School Committee v. Mr. and Mrs. K., supra.* Since the Administrative Law Judge has found that the District has offered [redacted] a FAPE, Appellant's argument fails. Appellant has not shown that his needs can only be met in a residential setting. Therefore [redacted]'s placement in the District is supported by its being the least restrictive environment.

CONCLUSIONS OF LAW AND DECISION

1. The Administrative Law Judge has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*; Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.*, C.R.S. (1997); and Part II, Section A, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1995-97.

2. The November 6, 1997 IEP offered [redacted] a free appropriate public education. Although the 1997 IEP was not prepared in a timely manner, it nonetheless afforded [redacted] a FAPE under the circumstances of this case. [redacted] has failed to establish that the District lacked the ability to deliver the educational program outlined in the 1997 IEP. The IEP's failure to address [redacted]'s encopresis further does not deprive him of a FAPE. The concern and distrust of the District by [redacted] and/or his parents is not so strong that it affects [redacted]'s ability to receive educational benefit from the IEP.

3. The Meeting School is not an appropriate placement for [redacted]. [redacted] has failed to establish that he is receiving educational benefit from TMS. As a part of this determination, the Administrative Law Judge has considered that his teachers are not certified. In addition, since there is no evidence that [redacted] needs a residential setting, his placement at TMS is not the least restrictive environment.

4. Since the District has offered [redacted] a FAPE and TMS is not an appropriate placement for him, the District has no obligation to bear the costs of [redacted]'s education at TMS.

5. The appeal filed by [redacted] is dismissed in its entirety.

6. This decision of the Administrative Law Judge is the final decision on state level review except that any party has the right to bring a timely civil action in

an appropriate court of law, either federal or state. State Plan, Part II, A, VII, B, 10 and 2220-R-6.03(12) (1 CCR 301-8).

DONE AND SIGNED

April 23, 1998

Nancy Connick
NANCY CONNICK
Administrative Law Judge

FOOTNOTES

1/ In Appellants' Opening Brief, [redacted] contended that the IHO erred by failing *to address the inappropriateness of the IEP dated October 25, 1996*. At the oral argument, however, Appellant's counsel clarified that the appropriateness of the education he received in the 1996-97 school year was not at issue. Rather, Appellant relies on the 1996 IEP to support his assertion that the District's performance under that IEP demonstrates an inability to deliver the program outlined in the 1997 IEP. The Administrative Law Judge thus addresses Appellant's arguments found under the heading of "The IHO erred in his failure to address the inappropriateness of District 70 IEP dated October 25, 1996" under the issue described in issue I.b (the District's ability to provide the program described in the 1997 IEP).

After the Administrative Law Judge sought to clarify this issue at the oral argument, Appellant's counsel indicated that the appropriateness of the program offered by the District between September 2, 1997 (the first day of the school year) and November 6, 1997 (the date the new IEP was developed) should be determined by reference to the 1996 IEP. Appellant never made this argument during the hearing before the IHO, however, and cannot now raise this new issue. This argument would require a determination of the appropriateness of the 1996 IEP, while Appellant identified the relevant issue as the appropriateness of the 1997 IEP and the IHO concurred (Order of November 8, 1997). The hearing before the IHO then focused on the 1997 IEP, and [redacted] relied on the 1996 IEP only to assert that his lack of progress that school year showed that the District is incapable of implementing the 1997 IEP. If the 1997 IEP were found to be inadequate, however, the District's reimbursement obligation would begin at the beginning of the school year, not November 6, 1997.

Asserted defects in the content of the 1996 IEP document (*e.g.*, the asserted lack of a statement of [redacted]'s current levels and of a program to address particular needs) are not relevant to a determination of whether the District can deliver the educational program outlined in the 1997 IEP and have in any case been superseded by that IEP. The Administrative Law Judge thus does not address these issues.

In addition, in Appellants' Opening Brief, Appellant argued that the IHO demonstrated bias against [redacted] and the [redacted] and in favor of the District. Appellant had previously indicated that he was asserting no due process violation in this matter. At the oral argument, Appellant's counsel clarified that the assertion of bias is not a separate issue, and the Administrative Law Judge thus does not address it as such.

2/ The Administrative Law Judge agrees with Appellant that the IHO's finding on page 4 of the Final Order, eighth full paragraph, regarding the [redacted] reactions to the 1997 IEP should be clarified and has done so. The Administrative Law Judge further agrees that not all classes at TMS are held in the morning, as the IHO asserted on page 4, ninth full paragraph. The Administrative Law Judge disagrees with Appellant's assertion that the IHO erred in finding unrebutted Ms. Walters' testimony that Mrs. [redacted] told her they were going to try to get the District to pay for a school they had found for [redacted] back East. The Administrative Law Judge recognizes the Mrs. [redacted] also testified regarding this conversation but does not find that her testimony rebuts that of Ms. Walters. The Administrative Law Judge has slightly modified the IHO's finding and added other findings regarding the timing of [redacted] decision to send [redacted] to TMS.

3/ In 1984 Dr. Susan Middleton diagnosed [redacted] with ADD with hyperactivity, which is known as ADHD. The parties appeared to use the terms "ADD" (Attention Deficit Disorder) and "ADHD" loosely and perhaps interchangeably during the hearing. Neither party disputes the IHO's finding that [redacted]'s disability is ADHD. For ease of reference, the Administrative Law Judge uses only the term "ADHD." ADHD is characterized by problems with: 1) attention and concentration, 2) impulse control and anger outbursts, and 3) hyperactivity. Organization also tends to be a problem for those with ADHD.

4/ The IEP included field trips at the [redacted] request based on [redacted]'s life interests and his success in the Outward Bound program.

5/ The only request made by the [redacted] which was not incorporated in the IEP was to preclude the sheriff or police from removing [redacted] from school grounds, a request not pursued in the due process hearing.

6/ When Mr. [redacted] was asked at hearing whether the District did anything to address [redacted]'s encopresis, he indicated that [redacted], who was almost 16, needed to take care of this problem himself.

7/ [redacted] is not more at risk for drug behavior than others his age and is perhaps at less risk due to this family environment. The risk of drug use increases for a person with a genetic background of substance abuse. Although there has clearly been some background of drug abuse in [redacted]'s extended family and Mr. [redacted] believes that this increases the risk for [redacted] the record is inconclusive in this regard.

8/ Appellant originally cited certain portions of IDEA regarding IEPs' being based on the most recent testing [20 U.S.C. 1414(d) (sic)] but during the oral argument conceded that these provisions had not yet become effective.

[9] Appellant also seeks to rely on the testimony of Dr. Middleton, described in paragraph 25 regarding [redacted]'s reaction to receiving homebound instruction after the mushroom incident. The Administrative Law Judge has not found Dr. Middleton's testimony about [redacted]'s reaction to be persuasive.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to: Melinda Badgley Orendorff, Esq., 409 N. Main, Suite 413, Pueblo, CO 81003; Jill S. Mattoon, Esq., Peterson & Fonda, P.C., 650 Thatcher Building, P.O. Box 35, Pueblo, CO 81002-0035; and Richard G. Fisher, Impartial Hearing Officer, 3686 South Forest Way, Denver, CO 80237-1015; and via Interoffice Mail to: Lorrie Harkness, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203, on April 23rd, 1998.

D Garcia

Secretary to Administrative Law Judge

ed9802st.dec/k/cl

Case No.: **L97:129**

Status: Impartial Hearing Officer Decision

Key Topics: Free Appropriate Public Education (FAPE)
Individual Education Plan (IEP)
Unilateral Placement

Issues:

- Did the school district fail to provide a FAPE and related services to the petitioner in violation of the IDEA?
- Did the school district fail in its implementation of services to the child as provided in his IEPs?
- Should the school district be required to reimburse the parent for tuition, room, board and travel expenses incurred for a child unilaterally placed in a private program at Sylvan Learning Center?

Decision:

- The evidence produced supports the proposition that a FAPE was and continues to be offered. However, the result desired, namely to help the child to reach a reading, writing and mathematic level at least to a grade 6 equivalent, has not been accomplished. The reasons for this failure do not rest with the offering of a FAPE however.
- Problems with student's lack of attendance or disruptions when he was in attendance. The school district nevertheless continues to offer the student a public education. Door remains open to the student.
- There was no credible substantiating evidence which showed the public school district's placement was violative of the IDEA requirements. Petitioner failed to prove claims therefore request for reimbursement of tuition costs and travel expenses is denied.

Discussion:

- Procedural Due process requirements have been met in regard to parent notification.
- Evidence showed no room and board expenses were incurred.

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DUE PROCESS HEARING L97:129

CL through his mother, Petitioner

vs.

PLATEAU VALLEY SCHOOL DISTRICT NO. 50, Respondent

DECISION AND FINDINGS

INTRODUCTORY STATEMENT

The matter was heard February 2, 3 and 4, 1998, before this Impartial Hearing Officer, in Grand Junction, Colorado. Jurisdiction is conferred by the Individuals With Disability Education Act (IDEA), 20 U.S.C. Sec. 1450, 34 C.F.R. Sec. 300 et. seq., and Part II, A, VII et. seq. of the Colorado Department of Education State Plan.

Petitioner appeared through his mother. Though earlier advised of having the right to be represented by an attorney, the mother elected to appear pro se. She was assisted at the hearing by her adviser/friend.

Respondent Plateau Valley School District (PVS) appeared through attorneys John Groves, esq. and David Price, esq. Also present on behalf of PVS were school superintendent Dr. Harry Masinton and the Director of Special Education, Mesa County Joint Administrative Unit, Howard Littler.

Petitioner filed a request for a Due Process Hearing on October 10, 1997. The 45 day hearing completion date was waived.

Parent asked the school district to reimburse her $4829 for tuition paid to Sylvan Learning Center (SLC) which sum included mileage expense in transporting him the 90 miles round trip each time he attended class. The district refused and parent requested this hearing.

PRELIMINARY MATTERS

1. By fax dated January 28, 1998 Petitioner requested a pre-hearing conference for the purpose of addressing Respondents Motion to Dismiss (which had previously been denied) and to request that the additional exhibits and witness listed by Respondents dated January 26, 1998 be denied admission (with the exception of the Sylvan Learning Center documents). By letter and fax this IHO did on January 29, 1998 inform the parties that he would hear their objections on February 2, 1998 immediately prior to commencing the hearing.

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2. Petitioner and Respondents oral arguments regarding Petitioners motion to deny admission of or testimony concerning Respondent's additional listed exhibits was heard. After listening to the statements of Petitioner and Respondent, and reviewing the Respondent's list, this IHO concluded that the documents listed had been earlier exchanged between them, that no surprise existed and that the exhibits were the same or similar to those listed as exhibits by the Petitioner. The truth or falsity of the documents, which appeared to be the basis for Petitioners objection, while a proper subject for examination in the hearing, would not be grounds to deny their being offered, The exhibits would be a necessary part of any evidence Petitioner wished to present in proof that her signature appeared on the documents fraudulently, as she had alleged. Petitioners motion was Denied.

3. On January 27, 1998 Respondent mailed suggested modifications to the Hearing Management Order earlier prepared by this Hearing Officer. This IHO heard the statements of the parties and ruled as follows:

Respondent's #1 re: Deletion of the word "public" from Part I, second paragraph, second sentence failed to significantly change the meaning content and was denied.

Respondents #2 Re: Part II, paragraph 1, Petitioner's substitution was denied as the allegations therein were meant to be those regarding Petitioner's views of the case and were not for Respondent to make or correct unless accepted by Petitioner. Paragraph 2 of Part II on the other hand was meant to summarize Respondents allegations. Respondent therefor had the right to make changes. The Paragraph 2 suggestion was granted. It was ordered that the original wording be stricken and Respondents's modification in substitution thereof be incorporated into the Hearing Management Order by reference.

FINDINGS OF FACT

1. The student is a 17 year old male diagnosed as having an Attention Deficit Hyperactive Disorder (ADHD). He reads and writes at a second grade level while his math skills are nearer fifth. He is, when not stressed, very personable. His verbal learning skill appears to more nearly approach that of others his age. At times the student displayed anger, was argumentative, disrupted classes, walked out of classes and often failed to complete class assignments.

2. In June of 1995 the parent sent a letter to the school district (exh. E) detailing complaints concerning the districts failure to help the student achieve those goals set forth in his IEP. In November of 1995 a staffing was held and the child's IEP was revised to specify half day school sessions, (exh. F). In March of 1996 the IEP was again revised to a 90 minute school schedule with an aid assisting in the instruction, (exh. G and exh. A-3 page

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2179). The latter modification was designed to help him prepare for taking the GED. His behavior plan was "to remain in place". The parent was present for and signed off on both staffings.

3. On the same day as the May 20, 1996, staffing a note addressed to the school administration, signed by the mother and the school principal, indicated the mothers desire that the plan developed earlier by the IEP team remain the same for the 1996-97 school year. See Exhibit F-13.

4. On September 17, 1996 an IEP staffing was scheduled for the 1996-97 school year, (exh. A-2). The IEP indicated that Kathy Posely, the case manager, gave the mother notice of the meeting on September 13, 1996. A copy of the parental consent form contains Kathy Posely's notations that the mother was unable to attend the Sept 17 staffing due to illness. A note of the meeting continuation was mailed her Sept. 19, (exh. F-12). the meeting was rescheduled for Sept. 23 and again for Sept. 24. The completed IEP plan documents, part of which are dated Sept. 17 and part dated Sept. 26, were mailed to the mother on Sept. 26, 1996.

5. Exhibit A-1 is the 1997-98 school year IEP meeting record. It reflects that a staffing review was scheduled for September 16, 1997. The notice, dated September 2, 1997, was received by the mother (exh. F-3).

6. In the 1995-96 school year the child attended school 86.25 day and was absent 66.75 days. In the 1996-97 school year he attended school on 29 days. He has not attended school during the 1997-98 term (exh. E-1).

7. Testimony concerning Kevin Miniger was that he was then a part time employee of the school district. The child worked with him on a school construction project while the district was attempting to obtain a classroom aide to assist the child, as called for in his IEP.

The following facts were admitted without need to prove same, after the hearing commenced, by stipulation of the Petitioner and Respondent:

"1. The District is a school district organized and existing under the laws of the State of Colorado. Pursuant to regulations promulgated by the Colorado Department of Education under the Exceptional Children Educational Act (ECEA) Sec. 22-20-101, et. seq., C.R.S., the District has contracted with Mesa County Valley School District No. 51 (MCVSD) to become part of MCVSD's administrative unit for purposes of compliance with IDEA and ECEA requirements. Pursuant to such contract, MCVSD's Pupil Services Department assists the District in administering and providing special education programs and services."

(Parent and Child names have been omitted below).

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"2. Ms. ________ is the mother of C____ L_____ (_____), a seventeen-year old former student at Plateau Valley School (PVS). PVS is a public school for grades K-12 operated by the District.

"3. C_____ was determined to be eligible under IDEA for special education since 1988. He has attended school at several different school districts in western Colorado which have developed IEPs for him, including the District."

"4. C_____ was a student at PVS from the 1992-93 school year through the 1996-1997 school year. C____ did not re-enroll at PVS in the fall of 1997."

"5. A written individualized educational plan (IEP) has been prepared for C____ each school year he has attended PVS since the 1992-93 school year."

"6. PVS held staffings at least annually in connection with preparation of each IEP for the school years 1992-93 through the present. Ms. C____ was present at all staffings except for the staffing for the 1996-97 school year in September, 1996, and the staffing held September 16, 1997 for the 1997-98 school year. When Ms. C____ received notice of the September 16, 1997 staffing, she informed the District's Superintendent, Harry Masinton, that she objected to the District holding any staffing regarding C____ because C____ was not then enrolled as a student at PVS."

"7. Ms. C____ signed IEP documents for the 1992-93, 1993-94, 1994-95 and 1995-96 school years. Each of the double-sided IEP signature pages Ms. C____ signed for such years are attached as Exhibit A-D."

(8. is omitted.)

"9. On or about June 29, 1995, Ms. C____ wrote a letter to the District's Superintendent and to members of the District's Board of Education. A copy of the letter and its attachments is attached as Exhibit E."

"10. By September 26, 1995, a triennial staffing to re-assess C___ IDEA eligibility and placement was completed. A representative from SLC participated in the staffing. C____ and Ms. C____ also participated and agreed with the recommended placement."

"11. On November 28, 1995, the District held another staffing. Ms. C____ signed an agreement regarding a modification of C____ IEP at that time, a copy of which is attached as Exhibit F."

"12. On March 19, 1996, Ms. C____ signed an agreement to further modify C____ IEP, a copy of such agreement is attached as Exhibit G."

"13. On May 20, 1996, Ms. C____ and PVS Principal Cindy Gross signed a memorandum, a copy of which is attached as Exhibit H."

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"14. On or about August 11, 1997 the District's Superintendent, Dr. Harry Masinton, and MCVSD' Director of Pupil Services, Howard Littler, each received a handwritten letter and bill from Ms. C____ requesting payment of $4,829 for tuition and mileage in connection with C____ attendance at SLC. Copies of the bill and letter are attached as Exhibits I and J, respectively."

"15. None of the IEPs prepared for C___ at PVS provided for instruction at SLC. Neither the District nor MCVSD received any written request for payment of Ms. C____ expenses to attend SLC prior to receipt of Exhibits I and J, respectively."

"16. The Distict denied Ms. C____ request for reimbursement by letter dated September 9, 1997, a copy of which is attached as Exhibit K."

"17. Ms. C____ filed her written request for due process hearing on October 10, 1997."

"18. Kevin Miniger does not hold a teacher's license in Colorado or any other state, and did not hold such a license at any time relevant to this proceeding."

LEGAL ISSUES

ISSUE 1. Did Respondent School District fail to provide a Free Appropriate Education (FAPE) and related services to Petitioner in violation of the Individuals With Disabilities Education Act (IDEA)?

> "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP." Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982).
>
> A 'free appropriate public education' is an education that guarantees a reasonable probability of educational benefits at public expense." Board of Education of Community Consolidated School District No. 21, Cook County, Illinois, v. Illinois Board of Education, 938 F. 2d 712 (1991).

The evidence produced supports the proposition that a FAPE was and continues to be offered. However, the result desired, namely to help the child to reach a reading, writing and mathematic level at least to a grade 6 equivalent, has not been accomplished. The reasons for this failure do not rest with the offering of a FAPE

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however.

ISSUE 2. Did the School District fail in its implementation of services to the child as provided in his IEPs?

The parties stipulated that IEPs were prepared, that the mother attended staffings and signed them from the 1992-93 school year through 1995-96. She was not present at staffings for the child and did not sign off on his IEPs for either 1996-97, his last attendance at PVS, or 1997-98.

In part, the mother based her attack of the 1996-97 and 1997-98 IEPs upon her non-participation and included in it a charge made that her signature may have been signed on an IEP without her authorization. The IEPs that would be in question are exhibits A-1 and A-2. Each contains a blank space where her signature was to appear. The evidence supports the proposition that she neither participated in nor signed off on the IEPs and that no one else affixed her signature thereto.

As to the need for parent participation, 34 C.F.R. Sec 300.345 states:

> "(a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including-
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
> (2) Scheduling the meeting at a mutually agreed on time and place."

I find that Notice of the IEP reviews was duly and properly given the parent. An opportunity to participate was provided. Her presence at the staffing was not a required condition for giving validity to the IEP. Procedural due process requirements have been met.

The mother further charges that the school district failed to teach the student and that this resulted in his not attaining the goals set out in his IEP.

> "The education of the children of this state should be a partnership between the parent and the state, or school district. The education of all our children is an important goal for the success of our society. It is best achieved by cooperation between the student, his or her parent, the teacher's and the school administrators involved in the child's education." In re Michael T., 1984-85 EHLR Dec.506:333.

In 1985 the partnership bonds frayed. The evidence showed an ever more frustrated and hostile parent trying to help her child, with a teenage child approaching manhood who increasingly refused to comply with parent and teacher expectations, or to attend

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school. The school was also becoming increasingly frustrated in attempting to educate the child while dealing with the disruptions caused when he was in attendance. There was no evidence that the school district was hostile to or encouraged the child not to attend though personal animosity between parent and superintendent was evident throughout this case. The school district nevertheless continues to offer the student a public education. If the child desires a free public education he is free to attend a public school. The schoolhouse door remains open to him.

ISSUE 3. Should the School District be required to reimburse the parent for tuition, room, board and travel expenses incurred for a child unilaterally placed in a private program at Sylvan Learning Center?

The evidence showed that the child was first enrolled in Sylvan Learning Center (SLC) programs in February of 1995 (exh. K-1). SLC provides supplemental educational opportunities for its pupils. Students typically attend two hours weekly while continuing to matriculate in their regular public school. The School District did not deny that the parent incurred the tuition costs claimed or that she was required to transport him in her own vehicle some 45 miles each way for each SLC class session. The evidence showed no room and board expenses were incurred.

At SLC the student would appear to progress at some sessions and make little or none at others. His records there reflect many session absences also.

The student would sometimes attend his public school while also attending SLC and sometimes he would not. At times he attended neither facility. The parent's testimony was that the child was not being taught in the public school anyway and that he was learning at SLC.

A parent who unilaterally changes their child's placement rather than accept the school district's placement may do so and be entitled to reimbursement if on review the reviewing officer concludes that the public placement violated IDEA and that the private placement selected was proper under the act. See Florence County School District v. Carter, 114 S. Ct. 361 (1993).

While the child was not progressing in public school and the parent is to be commended for attempting to solve the problem through SLC, there was no credible substantiating evidence which showed the public school district's placement was violative of the IDEA requirements.

The evidence showed that the school district followed procedural due process requirements. Review of the IEP's and the testimony establish that plans were formulated to provide some educational benefit to the child in accordance with his unique needs. The teachers and programs were available. In fact, programs were specifically fashioned to provide the equivalent of the SLC

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instruction.

The Act creates a presumption in favor of the educational placement established by the childs IEP, and a party attacking its terms bears the burden of showing why the educational program so established is not appropriate. See Tatro v. Texas, 703 F 2d 830.

CONCLUSION

The Petitioner has failed to prove her claims by a preponderance of the evidence. Petitioners request for reimbursement of tuition costs paid to Sylvan Learning Center and for travel expenses is therefor denied.

This decision and findings of fact will be mailed to the parents, the superintendent of the Plateau Valley School District No. 50 and the Colorado Department of Education.

Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by this Impartial Hearing Officer. An Administrative Law Judge shall be appointed to hear the appeal. Any party wishing to appeal the Impartial Hearing Officer's order, has the same rights as they had for this hearing. Either party may appeal to the court of appropriate jurisdiction if unsatisfied with the final order.

This Order is entered this 2nd day of March, 1998.

Raymond Lee Payne Jr.

Impartial Hearing Officer

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CERTIFICATE OF SERVICE

I certify that on this ____ day of March, 1998, a true and correct copy of the forgoing Final Order along with a photostatic copy of Rule 6.03 (10) of the Rules for the Administration of the Exceptional Children's Educational Act as promulgated by the Colorado State Department of Education, was placed in the United States Mail, postage prepaid, addressed to the following:

Pearl McDuffie
Special Education Services Unit
Colorado Department of Education
201 E. Colfax
Denver, Colorado 80203-1704

[redacted]

Dr. Harry Masinton
Plateau Valley School District No. 50
Rt. 1 Box 26
Collbran, Colorado 81624

Howard Littler, Director of Special Education
Mesa County Joint Administrative Unit
930 Ute Ave.
Grand Junction, Colorado 81501

Groves & Price, P.C.
405 Ridges Blvd. Suite 3
Grand Junction, Colorado 81503

Raymond Lee Payne, Jr.
Raymond Lee Payne, Jr.

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6.03 (8) (b) Officers and employees of school districts and administrative units.

6.03 (8) (c) Any person having a personal or professional interest, including persons involved with the care of the child, which would conflict with his or her objectivity in a hearing.

6.03 (8) (d) Parents of children with disabilities from birth to 21.

6.03 (9) Right to appeal decision of impartial hearing officer.

Either party may obtain state level review of the decision of the impartial hearing officer. The state level review shall be conducted on behalf of the Commissioner of Education by an administrative law judge of the Colorado Department of Administration, Division of Administrative Hearings.

6.03 (10) Procedure for appealing decision of impartial hearing officer.

6.03 (10) (a) Any party who seeks to appeal the decision of an impartial hearing officer shall file with or mail to the Division of Administrative Hearings within 30 days after receipt of the impartial hearing officer's decision:

6.03 (10) (a) (i) A notice of appeal.

6.03 (10) (a) (ii) A designation of the transcript. A party may designate a portion of the tape recorded record or arrange for a transcript of the tape recorded record.

6.03 (10) (b) Simultaneously with mailing or filing the notice of appeal and designation of transcript with the Division of Administrative Hearings, the appealing party shall mail copies of these documents to the Department of Education and to all other parties in the proceeding before the impartial hearing officer at their last known addresses.

Within five days of receipt of a notice of appeal, any other party may file a cross appeal.

6.03 (10) (c) The notice of appeal shall contain the following:

6.03 (10) (c) (i) The caption of the case, including case number and names of all parties.

6.03 (10) (c) (ii) The party or parties initiating the appeal.

6.03 (10) (c) (iii) A brief description of the nature of the case and the order being appealed.

6.03 (10) (c) (iv) A list of the issues to be raised on appeal.

6.03 (10) (c) (v) A copy of the findings of fact and decision of the impartial hearing officer being appealed.

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6.03 (10) (c) (vi) A certificate of service showing the date the copy of the notice of appeal was mailed to the Department of Education and to all parties in the proceeding before the impartial hearing officer. All subsequent documents and pleadings filed with the Division of Administrative Hearings shall similarly contain a certificate of service showing that a copy was mailed to all parties.

6.03 (10) (d) A notice of cross appeal shall contain those items listed in 6.03 (10) (c) (i-iv) above along with a certificate of service.

6.03 (10) (e) At the time the notice of appeal is filed or mailed, the appealing party shall also file with or mail to the Division of Administrative Hearings either a statement that no transcript is necessary for the appeal and a review of the tape recorded record is sufficient or a designation of all portions of the transcript necessary for resolution of the appeal. No transcript is required if the issues on appeal are limited to pure questions of law.

6.03 (10) (f) Within five days after the receipt of the notice of appeal and designation of transcript or tape recording, the other party may file with the Division of Administrative Hearings a designation of any additional portions of the transcript which the party believes are necessary for resolution of the appeal.

6.03 (10) (g) Whichever party appeals the decision shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days of the date the notice of appeal is mailed or filed.

6.03 (10) (g) (i) Whichever party appeals the decision shall, simultaneously with filing or mailing the notice of appeal and designation of record, contact the court reporter and order the transcript or arrange for the transcription of a tape recorded record or submit the entire tape recorded record.

6.03 (10) (g) (ii) Immediately upon filing any additional designations pursuant to Section 6.03 (10) (f) of these Rules, any party submitting designations shall order from the court reporter the transcript or arrange for transcription in the case of a tape recorded record and shall insure that such transcript is filed with the Division of Administrative Hearings within 15 days, or submit the entire tape recording.

6.03 (10) (g) (iii) A party requesting a written transcript is responsible for paying for it. A party requesting parts of a written transcript by filing an additional designation is responsible to pay for those portions of the transcript. Parent(s) shall not be required to pay for the cost of a copy of the tape recorded record for an

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appeal. The transcript or portions thereof shall be made available to any party at reasonable times for inspection or copying at the copier's expense.

6.03 (10) (h) Upon receipt of the notice of appeal, the administrative law judge assigned to hear the appeal shall direct the impartial hearing officer to certify and transmit to the administrative law judge, within seven days, all pleadings and documents filed with the impartial hearing officer, all exhibits and the decision of the impartial hearing officer.

6.03 (11) State level review procedures.

6.03 (11) (a) Unless otherwise ordered by the administrative law judge, briefs shall be filed and oral argument held within 20 days after the filing or mailing of the notice of appeal.

6.03 (11) (b) In conducting a state level review, the administrative law judge shall:

6.03 (11) (b) (i) Examine the transcript and certified record received from the impartial hearing officer.

6.03 (11) (b) (ii) Seek or accept additional evidence, if needed.

6.03 (11) (b) (iii) Afford the parties an opportunity for oral or written argument, or both, if appropriate, at a time and place reasonably convenient to the parties.

6.03 (11) (b) (iv) Determine and assure that the procedure at the hearing before the impartial hearing officer was in accordance with the requirements of due process.

6.03 (11) (b) (v) Make a final and independent decision and mail such to all parties within 30 days of the filing or mailing of the notice of appeal.

6.03 (11) (c) The administrative law judge may grant specific extensions of any of the timelines once a timely appeal has been received.

6.03 (11) (d) In connection with the state level review, the parties shall have the following rights:

6.03 (11) (d) (i) To be accompanied and advised by counsel and by individuals with special knowledge with respect to the problems of children with disabilities.

6.03 (11) (d) (ii) If further evidence is to be taken, to present evidence and confront, cross-examine, and compel the attendance of witnesses.

6.03 (11) (d) (iii) To prohibit the introduction of any evidence through witnesses or documents at the hearing if the witness has not been identified or the document has not been disclosed to that party at least five days before the hearing.

6.03 (11) (d) (iv) To obtain a written or electronic verbatim record of the hearing.

6.03 (11) (d) (v) To obtain a written determination upon state level review, including written findings of fact and a decision.

6.03 (12) The decision made upon a state level review shall be final except that either party has the right to bring civil action in an appropriate court of law, either federal or state.

6.03 (13) Attorneys' fees.

In any administrative proceeding brought under C.R.S. 22-20-101, et. seq., the impartial hearing officer or the administrative law judge may not award reasonable attorneys' fees as part of the cost to the parent(s) or guardian of a child with disabilities who is the prevailing party.

Case No.: **L97:133 and 134**

Status: Impartial Hearing Officer Decision

Key Topics:
Individual Education Plan (IEP)
FAPE
Suspension
Progress Reports

Issues:

- The students are paced at a disadvantage compared to other students because no choice of elective classes was provided for the fall semester.
- One student's IEP should have included similar language (as the other student's IEP) with respect to breaks and been implemented accordingly.
- District's psychologist and social worker are not consulting with teachers regarding the students' education as required by law.
- The District refused to follow the students IEP by not providing the student with appropriate breaks.
- The District refused to follow the IEP by not providing the students with the use of a computer.
- The District has refused to follow the IEP by not providing the student with complete reports regarding their progress.
- District refused to accommodate the student's secondary physical disability of asthma.
- District refused to provide student with a free and appropriate education since it has pretextually prevented him from returning to school following his three-day suspension in violation of the District's own policies.

Decision:

- Petitioner adequately complied with the procedures required by the IDEA in developing the students' IEPs.
- IHO lacks the authority under IDEA to determine whether Respondent reasonably accommodated the student's asthma.
- The elective classed provided by Respondent in the fall semester 1998 provided the students were reasonably calculated to enable each child to receive educational benefits.
- Respondent did not prevent the student from returning to school following his three-day suspension.
- Respondent provided the students with appropriate breaks.
- Petitioner did not provide evidence that Respondent refused to provide the students with the use of a computer, nor did the alleged failure to make such assignments deprive the students of a free and appropriate education.
- Respondent failed to provide complete weekly reports to Petitioner as specified in the students' IEPs. This failure did not materially affect the education received by the students.
- Petitioner failed to meet its burden in proving the District's psychologist and social worker did not consult with teachers as described in the students' IEPs.

Discussion:

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In the Matter of: S.O. & M.O. By and through their father, T.O. Petitioners, v. JEFFERSON COUNTY SCHOOL DISTRICT R-1 Respondent.	FINDINGS AND DECISION CASE NOS. 97-133 and 97-134 Impartial Hearing Officer Andrew J. Maikovich

I.

INTRODUCTORY STATEMENT

The above-captioned hearing was held at Red Rocks Community College in Lakewood, Colorado, on January 11, 12, and 13, 1999. The hearing was completed at 1244 Grant Street, Denver, Colorado, on January 14, 1999.

Petitioner requested the hearing pursuant to the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. Section 1450, 34 C.F.R. Section 300, et seq. There are jurisdictional questions with two of the issues in the case.

The seven issues identified for hearing by the Impartial Hearing Officer (IHO) in a prehearing order dated January 6, 1999, were:

Issue I—The District has refused to accommodate S.O.'s secondary physical disability of asthma.

Issue II—M.O. and S.O. are placed at a disadvantage compared to other students because no choice of elective classes was provided for the fall semester.

Issue III—The District has refused to provide M.O. with a free and appropriate education since it has pretextually prevented him from returning to school following his three-day suspension in violation of the District's own policies.

Issue IV—The District has refused to follow S.O.'s IEP by not providing him with appropriate breaks. M.O.'s IEP should have included similar language with respect to breaks and been implemented accordingly.

Issue V—The District has refused to follow the IEP by not providing the boys with the use of a computer.

Issue VI—The District has refused to follow the IEP not providing T.O. complete reports regarding their progress.

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Issue VII—The District's Psychologist and Social Worker are not consulting with teachers regarding the boys' education as required by law.

The burden of proof with respect to each issue resides with the Petitioner.

Although their cases were combined, the issues with respect to S.O. and M.O. differ. Their cases were combined in 1997—when Petitioners first filed a request for a due process hearing while attending Bell Middle School—for efficiency, in that many of the witnesses were the same for both boys.

II.

FINDINGS OF FACT

Seven issues were identified for the hearing. To provide a coherent review of those facts, the IHO has combined the background information and facts from Petitioners first three issues into Section 1. The IHO then listed facts material to the remaining issues into separate sections, including:

- Findings of Fact 1
    - Issue I—S.O.'s asthma
    - Issue II—M.O. and S.O.'s choice of electives
    - Issue III—M.O.'s return from suspension
- Findings of Fact 2
    - Issue IV—S.O.'s and M.O.'s breaks
- Findings of Fact 3
    - Issue V—Computer use
- Findings of Fact 4
    - Issue VI—Progress reports
- Findings of Fact 5
    - Issue VII—Psychologist and Social Worker consultations

Although the findings were divided into five sections to promote understandability of the facts influencing the IHO's decision regarding each issue, each finding of fact stands by itself with respect to the entire decision. Therefore, a finding of fact within any section can be considered true for purposes of any other section.

FINDINGS OF FACT, SECTION 1 (Issues I, II, III)

1. S.O. is a fourteen-year-old student enrolled in the ninth-grade at Golden High School for the 1998-99 school year.
2. M.O. is a fourteen-year-old student enrolled in the ninth-grade at Golden High School for the 1998-99 school year.
3. S.O. and M.O. are twins, although not identical twins.
4. S.O. and M.O. were originally diagnosed as students with disabilities requiring special education and related services pursuant to the IDEA in approximately the second grade. They have been receiving services because of their disabilities through the present.
5. In early-June 1998, Individual Educational Plans (IEPs) were developed for S.O. and M.O. by IEP staffing teams. These staffings were held prior to their beginning attendance at Golden High School.
6. The staffings used to develop S.O.'s and M.O.'s IEPs were thorough and complied with the procedures required by law. T.O. was an active participant in the staffings and his input was constructive to the process.
7. The IEPs developed for S.O. and M.O. were appropriate and complied with the IDEA.
8. In S.O.'s IEP, dated June 3, 1998, S.O.'s primary disability was identified as "Perceptual or Communicative Disability." [Exh. A-7].
9. S.O.'s secondary disability was identified as "Physical." S.O.'s secondary disability, "Physical," referred to Attention Deficit and Hyperactivity Disorder (ADHD), which S.O was diagnosed as possessing in grade school. S.O.'s secondary disability was identified after a long discussion by the IEP team.
10. S.O.'s IEP team identified a third educational disability, "Significant Identifiable Emotional Disability" (SIED).
11. S.O. also has asthma. Asthma was not identified as a disability in the IEP, although the IEP staffing team was aware of this medical condition.
12. During S.O.'s IEP staffing, T.O. was requested to update S.O.'s Health Plan. T.O. refused because, in his opinion, the school already had enough information and had concerns about the school releasing such information to inappropriate parties. The basis behind T.O.'s concerns was not presented at hearing, although T.O. had these same concerns when he refused to update similar information during S.O.'s Triennial staffing in 1997.
13. In M.O.'s IEP, dated June 2, 1998, M.O.'s primary disability was identified as "Perceptual or Communicative

Disability." No secondary disabilities were identified.

14. In August 1998, assistant principal Jill Colby contacted T.O. with a list of classes S.O. and M.O. could take as electives. Not every class was available to S.O. and M.O., although the IHO is unable to determine which classes were closed.

15. T.O. discussed the available choices with S.O. and M.O., who made their choices. T.O. then forwarded S.O.'s and M.O.'s choices to Ms. Colby. (The final decision came after several conversations between T.O. and Ms. Colby, although the IHO cannot determine the specific amount.)

16. A physical education course was discussed for S.O. T.O. did not say that S.O. could not participate in a physical education class because of his asthma at this time, although the IHO cannot determine the specific physical education courses that were discussed.

17. The IHO is unable to determine what choices M.O. and S.O. actually made or whether they were given their initial choices.

18. M.O. received weightlifting and aerospace as electives. S.O. received Team Sports (a physical education course) and drawing as electives.

19. On or about September 3, 1998, S.O., M.O., T.O., Jill Colby, and the students' former homebound teacher Deidre Harper met and discussed their schedules.

20. On or about September 3, 1998, Ms. Harper sat in on M.O.'s class in aerospace and determined the curriculum was too difficult for M.O. M.O. transferred into a Student Assistant class the next day at his request. M.O. would request the same class for the spring semester of 1999.

21. On or about September 3, 1998 (the first day of class), M.O. hurt his back in weightlifting class. He requested and transferred into Team Sports the next day.

22. S.O. volunteered to participate as a Student Assistant in the cafeteria prior to the school day.

23. M.O. volunteered to participate as a Student Assistant in the cafeteria prior to the school day so that he could ride to school with his sister.

24. M.O. volunteered for a Student Assistant role in the cafeteria during his lunch period.

25. On or about September 3, 1998, Ms. Colby sent a note to each of S.O.'s and M.O.'s teachers reminding them to review their IEPs. [Exh. E]

26. After approximately one week in school, T.O. took S.O. and M.O. on a family vacation to Mexico for one

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week. T.O. filled out the proper paperwork to comply with the school's prearranged travel program, making it an excused absence for S.O. and M.O.

27. While on vacation, S.O. began experiencing problems with his asthma.

28. To graduate from Golden High School, students need to receive one semester of physical education credit. Pursuant to District policy, this graduation requirement can be waived with a note from a physician that a student should not participate in physical education.

29. In mid-September 1998, Nurse Cathy Davis (through an assistant) sent T.O. a Health Care Plan with respect to S.O.'s asthma. [Exh. G, pg. 1, 2, and 3].

30. T.O. refused to provide additional information about S.O.'s asthma because of his concern about the release on page 2 of the plan [Exh. G-2] and the fact that he believed similar information had been misused in prior years.

31. S.O. was listed on Golden High School's Health Problems List for the fall of 1998 because of his asthma and ADHD. The Health Problems List is made available to teachers to make them aware of potential medical problems their students' may have. No evidence was presented on whether any or all of S.O.'s teachers reviewed this list.

32. S.O.'s Team Sports teacher, Mark Hornicker, was aware S.O. had asthma from reading S.O.'s IEP and a discussion with John Brodbeck.

33. On or about the second week of October 1998, T.O. went to Golden High School to discuss with assistant principal Jill Colby that S.O. was having difficulty with his asthma and that he was concerned about S.O. being forced to participate in his physical education class (Team Sports). Ms. Colby was not in the office, so T.O. explained his concerns with assistant principal and director of athletics Matt Lloyd. He told Mr. Lloyd that S.O. should not be participating in strenuous activities.

34. Mr. Lloyd assured T.O. that he would look into the situation since he, himself, had a child with asthma.

35. Mr. Lloyd told S.O.'s American history teacher John Brodbeck that S.O. was having difficulty with asthma and that he might look for a behavior change as a side effect of a change in medication.

36. Mr. Lloyd told Ms. Colby about his meeting with T.O. regarding S.O.'s asthma.

37. Ms. Colby spoke with physical education instructor Mark Hornecker about asthma and student participation in general. She did not specifically mention S.O., or if she did, Mr. Hornecker did not recall this conversation as being about S.O.

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38. Following their conversation, Ms. Colby was satisfied that Mr. Hornecker would not force students to participate to their detriment if they had asthma.

39. S.O.'s asthmatic condition improved shortly after the conversation with Mr. Lloyd.

40. Twice in class, S.O. told Mr. Hornecker that he couldn't participate because of his asthma. The IHO is unable to specify a date or timeframe for when these conversations occurred. On one occasion, Mr. Hornecker told S.O. to walk rather than run, and on another occasion to walk rather than participate in touch football.

41. S.O. is relatively hesitant to discuss his asthma.

42. Other than the two requests to Mr. Hornecker above, S.O. never showed symptoms of breathing difficulties in Team Sports or any other class.

43. On or about October 15, 1998, T.O. sent school district nurse Cathy Davis a letter regarding S.O.'s Health Plan. The letter stated that S.O.'s asthma was unstable. [Exh. H].

44. Within the next two weeks, S.O. told T.O. that he was forced to participate in a strenuous activity in Team Sports. The IHO makes no determination as to the accuracy of S.O.'s statement to T.O. or the activity involved (testimony included soccer, touch football, 100-yard dash, etc.).

45. While making no determination as to the accuracy of S.O.'s statement, the IHO finds that T.O. was concerned about S.O.'s physical education activities because of this conversation.

46. On approximately October 26, 1998, T.O. called Ms. Colby and expressed his concern that S.O. was still being required to participate in strenuous activities in physical education class. They scheduled a meeting to discuss S.O.'s Team Sports class on October 29, 1998.

47. On October 29, 1998, T.O. went to Golden High School for the meeting with Ms. Colby.

48. When T.O. arrived at Golden High School, S.O. and M.O. were sitting in the hallway outside Ms. Colby's office.

49. Unbeknownst to T.O., his son, M.O., had been suspended for three days for fighting. (The incident creating the suspension is not an issue in the present IDEA hearing.)

50. T.O. entered Ms. Colby's office. Ms. Colby was in the office, along with Golden High School principal Tom Dimit.

51. Either Ms. Colby or Mr. Dimit informed T.O. that M.O. had been suspended from Golden High School for three days. The parties discussed the reasons behind M.O.'s suspension.

52. Following the discussion about M.O.'s suspension, T.O. asked Ms. Colby and Mr. Dimit to remove S.O. from Team Sports because of his asthma.

53. At this point in the conversation, the IHO believes all parties had hostile tones of voice.

54. Ms. Colby and Mr. Dimit told T.O. that they would not remove S.O. from his physical education class until T.O. provided them with a physician's note saying S.O. could not participate in class. Ms. Colby also told T.O. that she was concerned that S.O. receive his physical education credit.

55. T.O. was aware that he needed to obtain a physician's note to have the District waive the physical education graduation requirement for S.O. T.O. obtained this information when he contacted the school months earlier regarding another child.

56. The IHO is unable to reconstruct the exact words exchanged in the conversation between T.O., Ms. Colby, and Mr. Dimit. However, the IHO finds that T.O. said words to the effect that unless he could receive assurances that his child would not have to participate in Team Sports, that he would take him home. Mr. Dimit told T.O. words to the effect that it was his prerogative or he could do what he had to do.

57. T.O. took M.O. and S.O. home following the conversation.

58. On October 29, 1998, Ms. Colby sent T.O. a letter regarding M.O.'s suspension. [Exh. TT-2]. The letter scheduled a readmission meeting for 7:15 a.m. on November 3, 1998 (the day M.O. could return to school following his suspension). The letter states that if T.O. was unavailable at that time, he should contact Ms. Colby to reschedule the conference.

59. T.O. received Ms. Colby's October 29, 1998 letter on or about the next day.

60. T.O. called Ms. Colby on or about November 2, 1998, and told her that he could not meet at the scheduled time and that T.O. wanted his attorney to attend the meeting. Ms. Colby informed T.O. that if he was bringing legal counsel to the meeting, the District would also bring legal counsel.

61. T.O. told Ms. Colby that the school could readmit M.O. without a readmission conference. Ms. Colby informed T.O. that M.O. could not return to school unless the parties had a readmission conference. She informed T.O. that M.O.'s suspension counted as a "habitually disruptive occurrence," and that M.O. needed to understand the seriousness of the offense. (If a student receives three habitually disruptive occurrences, he or she can be expelled.) T.O. told Ms. Colby that he had appealed the suspension and that District policy allowed for his child to be returned to school without a conference. Ms. Colby again told T.O. that a readmittance conference

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was required.

62. T.O. asked to speak with Mr. Dimit. Ms. Colby placed T.O. on hold and located Mr. Dimit. Mr. Dimit came into Ms. Colby's office to take the telephone call.

63. T.O. asked Mr. Dimit to readmit M.O. without the conference and told Mr. Dimit that district policy allowed him to waive it. The IHO is unable to determine exactly what Mr. Dimit said to T.O. in reply to his request, but he informed T.O. that he would not waive the readmittance conference.

64. The IHO makes no determination as to whether District policy allowed Mr. Dimit to waive the readmittance conference prior to allowing M.O. back to school. The IHO does find that even if the policy allowed for such a waiver, Mr. Dimit did not abuse his discretion in refusing T.O.'s request as there was no evidence that other students' suspended for "habitually disruptive activity" ever had a conference waived prior to readmittance.

65. T.O. contacted legal counsel at this time. T.O. and Mr. Dimit did not contact each other to reschedule M.O.'s readmittance meeting.

66. T.O. removed S.O. from school because the school district did not remove him from Team Sports.

67. T.O. did not return M.O. to school because a readmission conference was not held.

68. The school district would have allowed M.O. to return with a readmission conference following his three-day suspension.

69. Numerous contacts over the next month between T.O.'s counsel and School District counsel with respect to M.O.'s and S.O.'s removal from school are not part of the record.

70. On or about November 6, 1998, T.O. sent Mr. Dimit a letter stating his disagreement with M.O.'s suspension and punishment. [Exh. UU].

71. On or about November 18, 1998, Ms. Colby sent T.O. a letter explaining that M.O. had 10.25 unexcused absences during the semester and discussed state law with respect to those absences.

72. On or about November 18, 1998, Ms. Colby sent T.O. a letter explaining that S.O. had 11.25 unexcused absences during the semester and discussed state law with respect to those absences. [Exh. 4].

73. On or about November 20, 1998, T.O. requested a due process hearing.

74. On or about November 24, 1998, T.O. provided the School District with a note from Francine Andrews, S.O.'s doctor who treated his asthma. The note said she would advise against S.O. participating in gym and sports at school. [Exh. I]

75. Director of Intervention Services administrator Karen Gabe contacted Deidre Harper about providing homebound instruction to S.O. and T.O. Ms. Harper, who had provided homebound instruction to S.O. and M.O. the previous school year, was concerned about the boys being out of school again and asked Ms. Gabe why they were in homebound again. Ms. Gabe briefly explained to Ms. Harper the facts surrounding S.O.'s asthma and M.O.'s readmission conference and told her that both boys could return should they and their father decide to do so.

76. The IHO credits Ms. Harper's testimony as being honest and forthright.

77. On or about November 30, 1998, S.O. and M.O. began homebound instruction pursuant to a settlement agreement in which homebound education was identified as the stay put situation if a due process hearing was requested.

78. Approximately the second week in December 1998, homebound instructor Deidre Harper expressed to T.O. that she believed it was in S.O.'s and M.O.'s best interest to begin regular schooling again at Golden High School and that it was her understanding that the boys could return.

79. The homebound education received by S.O. and M.O. was not to the level of instruction they received while attending Golden High School.

80. S.O.'s and M.O.'s homebound education continues to the date of the IHO's decision.

FINDINGS OF FACT, SECTION 2 (Issue IV)

81. S.O.'s secondary disability, ADHD, prevents him from maintaining focus on specific tasks for long amounts of time.

82. As part of S.O.'s "Instructional Strategies/Accommodations/Classroom Assessments," S.O. was to be provided opportunities for frequent and appropriate breaks. [Exh. 1, pgs. 3 and 4]

83. S.O.'s science teacher Maureen Todd provided S.O. with appropriate breaks.

84. S.O.'s American history teacher John Brodbeck provided S.O. with appropriate breaks.

85. S.O. once requested a break in his language arts class, which was denied. Language arts teacher Linda Miller denied his request because it was made at a time when she was instructing the entire class and a break would have been inappropriate.

86. S.O. did not understand why he was denied this break in language arts class.

87. On or about October 8, 1998, S.O.'s drawing teacher (Youngman) reported to S.O.'s primary provider, Mr. Kary, that S.O. had been off-task in his drawing class. [Exh. O-1]. Mr. Kary discussed the situation with Mr. Youngman. As part of his weekly report, Mr. Kary reported to T.O. that S.O. had been off-task in drawing that week.

88. T.O. never expressed any concerns to Mr. Brodbeck about S.O. not receiving appropriate breaks prior to filling a complaint requesting a due process hearing.

89. M.O. was not denied any breaks in any classes.

FINDINGS OF FACT, SECTION 3 (Issue V)

90. As part of S.O.'s "Instructional Strategies/Accommodations/Classroom Assessments," S.O. was to be encouraged to use the computer for assigned written tasks. [Exh. 1, pg. 3]

91. As part of S.O.'s "Instructional Strategies/Accommodations/Classroom Assessments," S.O. was to be encouraged to use the computer for grammar check and spellcheck. [Exh. 1, pg. 4]

92. As part of M.O.'s "Instructional Strategies/Accommodations/Classroom Assessments," M.O. was to be encouraged to use the computer for grammar check and spellcheck. [Exh. 2, pg. 3]

93. To use the Internet in the Golden High School library, students must have a sticker applied to their student identification cards.

94. Students must have their parents sign a form agreeing that the student can use the Internet prior to receiving a sticker on their student identification cards.

95. Neither S.O. nor M.O. requested a form from a school official. T.O., therefore, has never signed the form. As a result, neither S.O. nor M.O. have stickers on their student identification cards. S.O. and M.O. cannot use the Internet.

96. M.O. attempted to use the Internet in the library in late October 1998 for a project in science class. The librarian told him he couldn't use the Internet because he did not have a sticker on his student identification card.

97. M.O. did not ask the librarian how to obtain a sticker and she/he did not tell him how to obtain a sticker. M.O. was suspended from school a few days later and did not pursue how to obtain one.

98. S.O. attempted to use the Internet at a date uncertain and was told he could not use the Internet because he did

not have a sticker on his student identification card.

99. Parental release forms are available to all Golden High School students. Should S.O. or M.O. have a parent sign this form, they will be allowed to use the Internet.

100. Language arts teacher Linda Miller taught a class in phonemic awareness to both S.O. and M.O.

101. During one class, S.O. turned on a computer while Ms. Miller was instructing the class. (The IHO is unable to determine when this conversation occurred.) Ms. Miller told S.O. that he could not turn on the computer.

102. S.O. informed T.O. that he was not allowed to use the computer in his language arts class. The IHO is unable to determine when this conversation occurred.

103. When S.O. is criticized, he tends to withdraw and does not always fully understand why he was the target of negative communication.

104. S.O.'s science teacher Maureen Todd did not assign any work to S.O. in which computers would have been appropriate.

105. S.O.'s American history teacher John Brodbeck did not assign any work to S.O. in which computers would have been appropriate.

106. S.O.'s language arts teacher Linda Miller assigned a project in which students had the option to use a computer to make a visual. She did not encourage S.O. to use the computer and he did not so choose. The IHO is unable to determine how S.O. completed the assignment.

107. This was the only assignment that Ms. Miller made in which it was appropriate to use a computer.

108. M.O.'s science teacher Mike Kary did not assign any work to M.O. in which computers would have been appropriate for spellcheck or grammar check.

109. M.O.'s language arts teacher Linda Miller did not assign any work to M.O. in which computers would have been appropriate for spellcheck or grammar check.

110. T.O. never informed S.O.'s primary provider, Mr. Kary, of his concern that S.O. was not provided opportunities to work on a computer. T.O. never informed Mr. Kary that he was concerned about M.O. not using a computer in science class.

111. T.O. never informed the School District of his concerns regarding S.O.'s and M.O.'s use of the computer—or lack thereof—prior to requesting a due process hearing.

112. T.O. never informed S.O.'s or M.O.'s primary providers of his concern about the Internet sticker prior to

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requesting a due process hearing.

FINDINGS OF FACT, SECTION 4 (Issue VI)

113. Under "Characteristics of Service," S.O.'s primary provider will consult and monitor S.O.'s progress in all classes and make weekly phone contact with T.O. to report progress. [Exh. 1, p. 7]

114. Under "Characteristics of Service," M.O.'s primary provider will consult and monitor M.O.'s progress in all classes and make weekly phone contact with T.O. to report progress. [Exh. 2, p. 6]

115. S.O.'s primary provider was Mike Kary. The IHO credits Mr. Kary's testimony as being honest and forthright.

116. Mike Kary began making weekly reports to T.O. over the telephone beginning the first full week that S.O. attended school.

117. To facilitate the process of receiving reports from S.O.'s teachers, Mr. Kary began leaving progress sheets with S.O.'s teachers the week of September 24, 1998. He requested that the teachers reply by Friday when he would call T.O. and provide him with an update regarding S.O.'s progress.

118. All of S.O.'s teachers made reports to Mr. Kary each week except as identified below:

- For the week of October 1, 1998, Mr. Hornecker (Team Sports) did not provide a report.
- For the week of October 8, 1998, Mr. Hornecker (Team Sports) and Ms. Goudin (Math) did not provide a written report.
- For the week of October 16, 1998, Ms. Goudin did not provide a written report.

119. Mr. Kary spoke with Ms. Goudin about S.O.'s progress either the week of October 1 or October 8. Ms. Goudin did not report any concerns about S.O.'s progress.

120. On or about October 8, 1998, Mr. Kary reported to T.O. that S.O. had been off-task in drawing. [Exh. O-1]. Drawing teacher Youngman had reported this to Mr. Kary, who discussed the situation with Mr. Youngman.

121. T.O. never expressed any concerns to Mr. Kary about not receiving timely reports for S.O. prior to filling a complaint requesting a due process hearing.

122. M.O.'s primary provider was John Brodbeck. The IHO credits Mr. Brodbeck's testimony as being honest and forthright.

123. John Brodbeck began making weekly reports to T.O. over the telephone beginning the first full week that

M.O. attended school.

124. To facilitate the process of receiving reports from M.O.'s teachers, Mr. Brodbeck began leaving progress sheets with M.O.'s teachers the week of September 17, 1998. He requested that the teachers reply by Friday when he would call T.O. and provide him with an update regarding M.O.'s progress.

125. All of M.O.'s teachers except for Food Service Supervisor Patty Low made reports to Mr. Brodbeck each week except as identified below:

- For the week of September 17, 1998, Mr. Hammock (Team Sports) did not provide a report. [Exh. GG].
- For the week of October 23, 1998, Fitzgerald (Math) and Mr. Hammock were late with their reports. Mr. Brodbeck provided T.O. with an update the following Friday regarding these late reports. No particular problems occurred or were reported in those classes.
- For the week of October 30, 1998, Ms. Hammock did not provide a report. [Exh. MM].

126. Mr. Brodbeck did not ask Ms. Low for a written report on M.O. because he believed the IEP only required him to collect information about M.O. for academic classes rather than all classes.

127. Food service supervisor Patty Low provided at least three verbal reports to M.O.'s primary provider.

128. T.O. spoke with Patty Low by telephone regarding S.O.'s and M.O.'s performance at least four times. She informed him they were excellent workers.

129. T.O. never expressed any concerns to Mr. Brodbeck about not receiving timely reports for M.O. prior to filling a complaint requesting a due process hearing.

FINDINGS OF FACT, SECTION 5 (Issue VII)

130. As a characteristic of service on S.O.'s IEP, S.O.'s teachers were to consult with a school psychologist and social worker "As needed, and at least once a month; 15-30 minutes." [Exh. 1, p. 7].

131. As a characteristic of service on M.O.'s IEP, S.O.'s teachers were to consult with a school psychologist and social worker "As needed, and at least once a month; 15-30 minutes." [Exh. 2, p. 6]

132. T.O. never asked anyone from the school district whether S.O.'s or M.O.'s teachers consulted with a school psychologist and social worker.

133. T.O. never requested that S.O.'s or M.O.'s teachers consult with a school psychologist and social worker.

134. Petitioner provided no evidence regarding whether consultations occurred.

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III.

DISCUSSION

Issues Dismissed by the IHO following Petitioner's Case in Chief

At the end of Petitioner's case-in-chief, the IHO agreed with Respondent's Motion to Dismiss with respect to Issues II, IV (with respect to M.O. only), and VII. While the IHO placed his reasons on the record at that time, a short summary of the IHO's decision to dismiss these issues follows.

Issue II—M.O. and S.O. are placed at a disadvantage compared to other students because no choice of elective classes was provided for the fall semester.

Petitioner alleged that no choice of elective classes was provided. Both T.O. and assistant principal Jill Colby testified that numerous conversations were held regarding M.O.'s and S.O.'s choice of electives.

Petitioner provided no evidence that any class M.O. or S.O. wanted was unavailable. S.O. testified he may have wanted weightlifting instead of team sports, although Petitioner appeared to argue at hearing that weightlifting was inappropriate for M.O., who hurt his back during the first day of class.

While aerospace appears inappropriate for M.O., Respondent replaced it with an elective M.O. testified he wanted—Student Assistant—the second day of class. M.O. subsequently requested Student Assistant for the spring semester.

In summary, Petitioner did not provide any evidence that a specific class necessary for either M.O. or S.O. to benefit from their education was selected by the students and denied.

Issue IV—M.O.'s IEP should have included similar language (as to S.O.'s) with respect to breaks and been implemented accordingly.

Petitioner alleged that M.O. was not provided appropriate breaks. Petitioner did not provide any evidence regarding a break that M.O. requested and was denied. In fact, M.O. testified that he was allowed to take all of the breaks he needed.

In addition, Petitioner did not provide any evidence that T.O. requested similar language in M.O.'s IEP during the staffing, a meeting that met the procedural requirements of the IDEA and to which he provided significant contributions.

Issue VII—The District's Psychologist and Social Worker are not consulting with teachers regarding the boys' education as required by law.

As a characteristic of service on S.O.'s and M.O.'s IEP, the children's teachers were to consult with a school psychologist and social worker "as needed, and at least once a month; 15-30 minutes." Petitioner alleged that the District's psychologist and social worker did not consult with S.O.'s and M.O.'s teachers as described.

Petitioner presented no evidence, direct or hearsay, that consultations did not occur. Petitioner's allegation was based entirely on the fact that he had been informed by a primary provider that one or both of his children had been off-task. Therefore, T.O. testified that he believed consultations were not occurring.

There was no evidence that T.O. asked anyone from the school district whether the school psychologist and social worker consulted with the children's teachers, nor did Petitioner call the school psychologist, social worker, or any teachers as witnesses to elicit testimony as to whether these consultations, in fact, occurred.

In summary, Petitioner did not present any evidence by which the IHO could determine whether consultations occurred or not, nor did Petitioner call any witnesses who had knowledge—either direct or indirect—with respect to whether consultations occurred.

Discussion of Remaining Issues

In this section of the decision, the IHO will address each of the remaining issues alleged by the Petitioner. The issues have been grouped as such:

- Issues IV (with respect to S.O.), V, and VI. These issues involve the children's IEPs and/or implementation thereof.
- Issues I and III. Respondent challenges the IHO's jurisdiction for both issues.

The IHO will address the issues involving the students' IEPs first.

Issue IV—The District has refused to follow S.O.'s IEP by not providing him with appropriate breaks.

In S.O.'s IEP, under the section entitled, "Instructional Strategies, Accommodations/Classroom Assessments," teachers and parents are asked "to provide opportunities for frequent and appropriate breaks." This strategy was included because S.O.'s secondary disability, ADHD, prevents him from maintaining focus on specific tasks for long amounts of time.

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Evidence presented at hearing by Petitioner with respect to S.O. not receiving appropriate breaks included:

- S.O.'s testimony that he was denied breaks in language arts class.
- T.O.'s testimony that because he received reports that S.O. was having difficulty focusing in class, S.O. must not be receiving appropriate breaks.

The IHO finds that each of S.O.'s teachers was aware of his need to take frequent breaks. S.O.'s need for breaks was described in his IEP, which his teachers read. Science teacher Maureen Todd, American history teacher John Brodbeck, and language arts teacher Linda Miller all testified they provided S.O. with appropriate breaks.

Petitioner argues that Ms. Miller's class did not provide S.O. with appropriate breaks. S.O. testified that students in the class were only allowed one break per week (including bathroom and drinks). S.O.'s testimony was discredited by M.O.'s testimony that he was provided with adequate breaks in all of his classes—including the same language arts class as S.O.

Clearly, S.O. was denied one break in Ms. Miller's language arts class. She testified that she denied M.O.'s request because it came at an inappropriate time when she was instructing the entire class.

During Petitioner's questioning of Connie Sperberg, Ms. Sperberg stated that S.O. does not always respond well to negative actions taken against him. Throughout the testimony, it became clear to the IHO that when S.O. is provided with negative feedback, he understands that he is supposed to stop his activities, but often does understand why he was told to stop. In the opinion of the IHO, S.O. did not fully understand why Ms. Miller rejected his request for a break. Therefore, he may have thought he could only take one break per week.

In general, there is no evidence by which the IHO could conclude that S.O. was not provided with appropriate breaks in any of his classes.

Issue IV—The District has refused to follow the IEP by not providing the boys with the use of a computer.

S.O.'s IEP states under "Instructional Strategies, Accommodations/Classroom Assessments," that teachers should "encourage use of the computer for assigned written tasks." It also states that teachers should "encourage use of the computer for grammar check and spellcheck." M.O.'s IEP states that teachers should "encourage use of spellcheck/grammar check on computer."

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Petitioner's argument with respect to the computer is based on two issues:

- S.O. and M.O. could not use the Internet because they didn't have the requisite sticker on their student identification card.
- S.O. and M.O. never used the computers during their attendance at Golden High School.

The IHO will look at each issue separately.

With respect to the Internet, it is Golden High School policy that students may only use the Internet if they have a sticker on their student identification cards. To obtain a sticker, students must have their parents sign a form and return it to the school library.

Apparently many students obtained this form and had their parents complete it during the first days of school. Because S.O. and M.O. did not attend the first days of school, they did not know about the form and subsequently did not obtain the required sticker.

The IHO gives no credence to this issue. No evidence was presented that S.O. and M.O. were treated differently than any other student. At any time, they could obtain a form from the library, have T.O. or another guardian sign it, return it to the school, and obtain an Internet sticker.

Even if the students' had been prevented from obtaining a sticker, it would have had no impact on the spellcheck or grammar check strategy described in M.O.'s or S.O.'s IEP, as the Internet is not typically used for this activity. With respect to S.O.'s strategy of encouraging use of the computer, testimony only identified one potential class assignment upon which S.O. could have used the Internet. There is no evidence this lack of opportunity had any affect on S.O.'s education.

Petitioner's argument with respect to S.O.'s and M.O.'s failure to use a computer while attending Golden High School similarly fails. In Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al., 102 S.Ct. 3034 (1982), the U.S. Supreme Court held that an inquiry into whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?
2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

The methodology used within a classroom—such as whether a computer should or should not be used—is not a required element in an IEP. "Therefore, while Part B does mandate the required components to be included in each child's IEP to ensure that the child's identified educational needs can be addressed, Part B does not expressly

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mandate that the particular teacher, materials to be used, or instructional methods be included in a student's IEP." Letter to Hall, U.S. Department of Education, Office of Special Education and Rehabilitative Services, 21 IDELR 58 (1993).

The fact that the School District was not required to discuss the use of a computer in S.O.'s and M.O.'s IEP does not mean that it can totally disregard it once it is included in students' IEPs. Whether or not teachers comply with a student's "Instructional Strategies, Accommodations/Classroom Assessments," can still provide evidence of whether a student's IEP is, in fact, being complied with as a whole. What the IHO does not believe is appropriate for a due process hearing, however, is determining whether a specific methodology should or should not have been used for any particular assignment.

S.O. and M.O. were only students in Golden High School for approximately eight weeks in the fall semester. Evidence identified only one assignment in which it might have been appropriate for S.O. to use a computer had he possessed an Internet sticker (the IHO makes no determination whether it would or would not have been appropriate.) There was no evidence that M.O. could have appropriately used spellcheck or grammar check for any of his assignments.

The IHO finds that S.O.'s and M.O.'s educational benefit was not restricted because of their failure to use computers.

Issue VI—The District has refused to follow the IEP not providing T.O. with complete reports regarding their progress.

S.O.'s and M.O.'s IEP state that the children's primary providers will make weekly reports to T.O. in all classes. T.O. requested this during S.O.'s and M.O.'s IEP staffings because of his desire to stay current with his children's progress in school.

S.O.'s primary provider was Mike Kary. M.O.'s primary provider was John Brodbeck. Both primary providers began making weekly telephone calls to T.O. at the beginning of the school year.

Testimony shows that certain reports were late and others were missing.

With respect to S.O., the following reports were missing or late:

- For the week of October 1, 1998, Mr. Hornecker (Team Sports) did not provide a report.
- For the week of October 8, 1998, Mr. Hornecker (Team Sports) and Ms. Goudin (Math) did not provide a written report.

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- For the week of October 16, 1998, Ms. Goudin did not provide a written report.

For M.O., the following reports were missing or late:

- For the week of September 17, 1998, Mr. Hammock (Team Sports) did not provide a report. [Exh. GG].
- For the week of October 23, 1998, Fitzgerald (Math) and Mr. Hammock were late with their reports. Mr. Brodbeck provided T.O. with an update the following Friday regarding these late reports. No particular problems occurred or were reported in those classes.
- For the week of October 30, 1998, Mr. Hammock did not provide a report.

In addition, no reports were provided by Food Service Supervisor Patty Low because Mr. Brodbeck believed he was only required to report to T.O. on M.O.'s academic classes, and this was a Student Assistant class.

The IHO finds there was not full technical compliance with S.O.'s and T.O.'s IEP with respect to weekly reports. The next question, therefore, is whether this technical failure impacted S.O.'s and T.O.'s right to a free and appropriate education (FAPE).

Technical violations in and of themselves can provide the basis for finding a school system has failed to provide FAPE. Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987). However, technical violations must result in some prejudice to the student or parents before they can be considered violations of the IDEA. Urban v. Jefferson County School Dist. R-1, 89 F.3d 720 (10th Cir. 1996).

The IHO finds that these technical violations did not result in prejudice to the Petitioner.

The testimony was clear that both primary providers, Mike Kary and John Brodbeck, were conscientious in their efforts to stay apprised of their students' progress. Petitioner's closing argument included a statement regarding the care that Mr. Kary and Mr. Brodbeck have for S.O. and M.O. Although they were unable to obtain a written weekly report from every teacher, the evidence shows that they received verbal updates from teachers beyond the one written report a week they scheduled. The IHO was impressed with the conscientiousness of their efforts.

For example, with respect to S.O., Mr. Kary testified that he remembers speaking with Ms. Goudin's with respect to S.O.'s math class on a week when he didn't receive a written report. And even when he did receive a late report, Ms. Goudin told him that S.O. was not having problems.

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While problems may have occurred in S.O.'s Team Sports class, the problem wasn't related to the lack of reports, but with the information received by Mr. Hornecker from administration. We will discuss this at length in the next section.

With respect to M.O., Ms. Low testified that she spoke with T.O. four times about his children and their participation in her class. She had nothing but glowing reports to make regarding both boys.

In the IHO's opinion, the district's failure to provide full and complete reports did not affect S.O.'s and T.O.'s education. The IHO respects T.O.'s request to remain up-to-date on his children's academic progress. However, the fact that T.O. did not complain to the primary providers about receiving late reports, and in fact did not complain about these reports until after removing his children from school, makes the IHO believe that this issue was considered by Petitioners to be merely a technical violation at the time they were late. When T.O. identifies a problem that he considers material, as he did with the final two issues of the case, he forcefully expresses his concern.

Issue I—The District has refused to accommodate S.O.'s secondary physical disability of asthma.

Issue III—The District has refused to provide M.O. with a free and appropriate education since it has pretextually prevented him from returning to school following his three-day suspension in violation of the District's own policies.

The final two issues are extremely important in that they led Petitioner to withdraw his children from Golden High School. They also have jurisdictional issues regarding whether the IHO can appropriately decide the claims under the IDEA. Respondent filed a motion to dismiss these claims prior to the hearing, which the IHO rejected. The IHO revisits these motions after hearing the evidence and more fully understanding the arguments.

Jurisdiction Under the IDEA

Issue number one in Petitioners request for a due process hearing is, "The District has refused to accommodate S.O.'s secondary physical disability of asthma."

The record shows that the IEP staffing team deliberated at length and determined that S.O. had three disabilities making him eligible to receive special education and related services under the IDEA. These disabilities are:

1. Perceptual or communicative disability
2. Physical (ADHD)

3. Significant Identifiable Emotional Disability

S.O.'s asthma was not identified as a disability requiring special education or related services.

Asthma is not one of the 13 categorical disabilities identified in the IDEA as requiring special education or related services. Section 20 U.S.C. Section 1401(3)(A)(i) lists mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, or other health impairments, or specific disabilities as falling within the IDEA. In this particular case, the IEP staffing team found that S.O.'s ADHD was an "other health impairment."

Petitioner argues that asthma should also have been identified as an "other health impairment." While S.O.'s asthma is clearly a medical condition and one discussed by the IEP staffing team, the team did not identify it as a disability requiring special education or related services. Petitioner did not provide evidence that it should have been so identified. If T.O. has additional information to show that asthma is an "other health impairment," his remedy is to ask for the IEP team to reconvene to consider this additional information.[1]

Petitioner argues that even if asthma isn't identified as a disability under the IDEA, that the School District is still required to meet each of S.O.'s non-identified needs, including asthma. The IHO can find no case law supporting this assertion under the IDEA. Again, the IHO makes no determination whether the School District met its requirements under other federal or state laws.

Therefore, the IHO determines that he lacks jurisdiction to decide this issue under the IDEA. However, because a significant amount of time and effort was spent hearing evidence on this issue, the IHO will make a determination on the facts should an appeal determine that the IHO does, in fact, have such jurisdiction with respect to S.O.'s asthma under the IDEA.

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[1] The IHO makes no determination as to whether S.O.'s asthma is a disability meeting the criteria of Section 504 of the Rehabilitation Act of 1973 (Section 504). "Students who do not meet the standards under Part B of the IDEA may still fit within the Section 504 definition as a person with an impairment which substantially limits a major life activity." Letter to Veir, Office for Civil Rights, 20 IDELR 864 [Date not provided].

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With respect to M.O., the facts show that he was suspended from school for three days in late October. (The reasons behind this suspension are not at issue in the case.) Petitioner alleges that M.O. was "pretextually prevented him from returning to school following his three-day suspension in violation of the District's own policies."

Under the IDEA, school districts are obligated to provide appropriate special education services to an eligible student who is suspended/expelled for more than 10 school days regardless of whether the misconduct is related to the student's disability. U.S. Department of Education Policy Letter, IDELR 213:258 (1989). (Affirmed Virginia Department of Education v. Riley, 24 IDELR 278 (4th Cir. 1996)). M.O. has missed significantly more than 10 days of school because of the facts surrounding his suspension and failure to return thereafter. The IHO finds he has jurisdiction to determine whether the school district refused to allow M.O. back in school for more than 10 days. Therefore, the IHO will analyze the facts surrounding M.O.'s failure to return from his suspension.

Issues of Fact

While the reasons behind S.O.'s and M.O.'s extended absence from Golden High School are separate issues, they are interrelated in that the actions in one case influenced the actions of the other.

The IHO will briefly recite the facts as determined by the evidence presented at hearing.

S.O. has asthma. In the middle of October 1998, T.O. went to Golden High School to inform assistant principal Jill Colby that S.O. was having difficulty with his asthma and to express his concern about S.O. being forced to participate in his Team Sports class. T.O. became aware of the problem when S.O. told T.O. that he had been forced to perform a strenuous activity in the class.

Ms. Colby was not in the office, so T.O. told assistant principal and director of athletics Matt Lloyd of his concerns. Mr. Lloyd informed T.O. that he had a child with asthma and would make sure that the situation would be addressed.

Mr. Lloyd told Ms. Colby about his meeting with T.O. Ms. Colby spoke with S.O.'s Team Sports teacher, Mark Hornicker, about asthma in general and how he handles situations when students have asthma. Whether Ms. Colby mentioned S.O. specifically cannot be determined. However, Mr. Hornecker that he does not recall Ms. Colby specifically mentioning S.O.

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Sometime thereafter, S.O. told T.O. that he was forced to participate in a strenuous activity again. (Again, the IHO was unable to determine the exact conversation or sport that S.O. and T.O. discussed.) On or about October 26, 1998, T.O. scheduled a meeting with Ms. Colby for October 29, 1998, to discuss the situation.

When T.O. arrived at Golden High School, he found S.O. and M.O. sitting in the hallway outside Ms. Colby's office. Unbeknownst to T.O., his son M.O. had been suspended for three days for fighting.

Golden High School principal Tom Dimit was also in Ms. Colby's office when T.O. entered. They discussed M.O.'s suspension with which T.O. did not agree.

They then discussed S.O.'s asthma. T.O. demanded that S.O. be removed from his Team Sports class. Ms. Colby told T.O. that she would not remove him from the class so late in the semester. Mr. Dimit told T.O. that he would need a doctor's note before they would remove him from the class. T.O. told Mr. Dimit that if he could not be assured that his son would not have to participate in Team Sports, then he would remove him from school. Mr. Dimit replied with words to the effect of, that was his prerogative or he could do what he had to do.

T.O. took S.O. and M.O. home and they have not returned to Golden High School.

On October 29, 1998, Ms. Colby sent T.O. a letter scheduling a readmission meeting for 7:15 a.m. on November 3, 1998 (the day M.O. could return to school following his suspension). The letter stated that if the time was inconvenient, he should contact Ms. Colby to reschedule the conference.

T.O. called Ms. Colby on or about November 2, 1998, and told her that he could not meet at the scheduled time and that T.O. wanted his attorney to attend the meeting. Ms. Colby informed T.O. that if he was bringing legal counsel to the meeting, the District would also bring legal counsel.

T.O. told Ms. Colby that the school could readmit M.O. without a readmission conference. Ms. Colby informed T.O. that M.O. could not return to school unless the parties had a readmission conference. She informed T.O. that M.O.'s suspension counted as a "habitually disruptive occurrence," and that M.O. needed to understand the seriousness of the offense. (If a student receives three habitually disruptive occurrences, he or she can be expelled.) T.O. told Ms. Colby that he had appealed the suspension and that District policy allowed for his child to be returned to school without a conference. Ms. Colby again told T.O. that a readmittance conference was required.

T.O. then spoke with Mr. Dimit about readmitting M.O. without the conference and told Mr. Dimit that district policy allowed him to waive the meeting. The IHO is unable to determine exactly what Mr. Dimit said to T.O. in reply to his request, but he informed T.O. that he would not waive the readmittance conference.

The readmittance conference has never been rescheduled and M.O. has not returned to school.

As stated earlier, the issue for the IHO is whether the School District has prevented M.O. from returning to school or whether M.O.'s absences were caused by T.O.'s decision to keep him at home.

A significant amount of time was spent at the hearing attempting to identify how the conversations between T.O. and Ms. Colby and Mr. Dimit ended. Both sides attempted to show that the other party was supposed to call them. The IHO is unable to make this determination and does not believe it would be dispositive if he could determine it. A child's removal from school is an extremely serious event. The parties have spoken through counsel numerous times since the meetings described above. Either party could have asked to reschedule the conference during any of these discussions. Clearly the issue goes beyond who was supposed to call whom.

Therefore, the IHO must determine whether the School District prevented T.O. from returning M.O. following his suspension. For the following reasons, the IHO finds the School District did not prevent M.O.'s return and that M.O. has remained in home schooling at the discretion of T.O.

Petitioner worded the issue as such: The District has refused to provide M.O. with a free and appropriate education since it has pretextually prevented him from returning to school following his three-day suspension in violation of the District's own policies. In Petitioner's own words, the District didn't refuse to readmit M.O., but "pretextually" prevented his readmission. It is not clear what Petitioner means by the word "pretextually" in this instance, but the IHO understands it to mean the School District would not reschedule the readmission conference. The evidence shows the School District would have rescheduled the conference with a minimum of effort by T.O.

In Ms. Colby's October 29, 1998, letter to T.O., she scheduled the conference for 7:15 a.m. on November 4. The letter further stated that he should call "if you are unable to attend at this date and time so that reasonable efforts can be made to reschedule the conference." T.O. called Ms. Colby to reschedule the conference so that it could include his attorney. The IHO does not believe that T.O. waited, and continues to wait, for the School District to call him about rescheduling the conference. The IHO cannot imagine any parent with a child out of school for more than a day or two would allow a misunderstanding as to who was to call whom to continue for months. At some point, a parent would call to confirm the schedule.

The IHO also believes the testimony of Deidre Harper is very credible. Ms. Harper testified that she told T.O. that Karen Gabe had told her that S.O. and M.O. could return to school. Even if there had been a misunderstanding as to scheduling, which the IHO does not find, a parent certainly would have called to confirm this information after hearing it from a trusted teacher. T.O. did not make this call.

In fact, to this very day, M.O. remains out of school. Clearly, at some point in this hearing process, T.O. discovered that M.O. can return to school following a short readmission conference.

While the IHO is unable to determine whether there was a misunderstanding as to readmission scheduling during the first week of November, Petitioner has not met its burden of proving by a preponderance of the evidence that the reason M.O. has been out of Golden High School for over two months is not solely at the election of T.O.

The IHO had greater difficulties with the handling of S.O. and his asthma.[2] In the IHO's opinion, had the School District explained its policy regarding asthma and physical education to T.O. in the way it presented it during the hearing, this incident could have been avoided. That not being the case, the IHO will analyze this issue under the facts as presented.

Once again, significant effort was made by both parties to show that T.O. did not update S.O.'s Health Plan regarding his asthma. The IHO finds that T.O. did not update the Health Plan and had not for nearly two years because of unspecified security concerns. The IHO also finds that regardless of whether T.O. updated the plans, the School District knew that S.O. had asthma. It is mentioned in S.O.'s IEP, IEP staffing members testified that it was discussed, and T.O. discussed it with Mr. Lloyd during a meeting in mid-October. With or without a signed Health Plan, the School District was on notice that S.O. had this condition.

When S.O. informed T.O. that he was still being forced to participate in physical education, T.O. scheduled a meeting with Ms. Colby. When T.O. arrived for the October 29, 1998 meeting, he discovered M.O. had been suspended for fighting. Because of this unusual circumstance, the IHO believes T.O. was angry when the discussion surrounding S.O.'s medical condition took place. It also appears that Ms. Colby and Mr. Dimit did not show a great amount of personal restraint. In other words, instead of a reasoned discussion, the tone was angry and confrontational.

Ms. Colby and Mr. Dimit told T.O. that S.O. would not be removed from Team Sports without a note from a physician and that he would remain in the class until that time. When T.O. told Mr. Dimit that he would then remove S.O. from school, Mr. Dimit testified that he replied words to the effect of, "That's your prerogative."

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[2] The IHO repeats his finding that he does not have jurisdiction under the IDEA to decide this issue. The findings hereafter are solely for the purpose of delineating the facts should an appeal determine the IHO does have jurisdiction regarding this issue.

The IHO is not in the position to tell T.O. that he should not have removed S.O. from the school. In T.O.'s opinion, his son would have been in danger of injury had he continued participation in Team Sports. And despite Ms. Colby's testimony that she was comfortable with Mr. Hornecker and how he would handle S.O.'s asthma, the situation was clearly mishandled. Despite the fact that T.O. personally visited the Golden High School and spoke with Mr. Lloyd about his concerns regarding S.O. in Team Sports, administrators inexplicably failed to forward the information regarding S.O.'s asthma to Mr. Hornecker. While other teachers testified they received information about S.O.'s condition, the teacher with the greatest need for this information did not.

While T.O. was not unreasonable in removing S.O. from school, however, he was unreasonable in keeping S.O. from school thereafter. T.O. was aware that S.O. could have the physical education graduation requirement waived by providing Golden High School with a physician's note that S.O. should not participate physical education. Not only did Ms. Colby and/or Mr. Dimit explain this at the meeting, but T.O. had received this information months earlier with respect to another child.

In fact, on or about November 24, 1998, T.O. provided the School District with a note from Francine Andrews, S.O.'s doctor with respect to his asthma, advising it that S.O. should not participate in gym and sports at school. Golden High School thereafter waived this graduation requirement. Despite the fact that S.O.'s problem with physical education has been solved, T.O. has not returned S.O. to school. In fact, the IHO knows of no reason why S.O. did not return to school the day after T.O. forwarded the physician's note. The IHO can come to no other conclusion than S.O. is not presently attending Golden High School at the sole discretion of T.O.

In summary, while the IHO finds problems with both parties' actions regarding S.O.'s removal from school, S.O.'s long-term absence from school (beyond one or two days needed to obtain a physician's note) was at the sole discretion of T.O.

IV.

CONCLUSION

Based on the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. Petitioner adequately complied with the procedures required by the IDEA in developing S.O.'s and M.O.'s IEPs.

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2. The IHO lacks the authority under the IDEA to determine whether Respondent reasonably accommodated S.O.'s asthma.
3. The elective classes provided by Respondent in the fall semester 1998 provided S.O. and M.O. were reasonably calculated to enable each child to receive educational benefits.
4. Respondent did not prevent M.O. from returning to school following his three-day suspension.
5. Respondent provided M.O. and S.O. with appropriate breaks.
6. Petitioner did not provide evidence that Respondent refused to provide S.O. and M.O. with the use of a computer, nor did the alleged failure to make such assignments deprive S.O. and M.O. of a free and appropriate education.
7. Respondent failed to provide complete weekly reports to T.O. as specified in S.O.'s and M.O.'s IEPs. This failure did not materially affect the education received by S.O. and M.O.
8. Petitioner failed to meet its burden in proving the District's psychologist and social worker did not consult with teachers as described in S.O.'s and M.O.'s IEPs.

The findings will go to the parents, the superintendent of Jefferson County School District R-1, and the Colorado Department of Education. Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by the IHO.

Andrew J. Maikovich 1/25/99

Andrew J. Maikovich
Date: January 25, 1999

Case No.: **L97:137**

Status: Impartial Hearing Officer Decision

Key Topics: Individual Education Plan (IEP) Implementation
Free Appropriate Public Education (FAPE)
Compensatory Education

Issues:

- Did the school district properly implement the May 1997 IEP?
- Is the document generated in a meeting in October 1997, an IEP as provided by law?

Decision:

- The school district implemented the IEP in good faith.
- The document produced after the October meeting is a valid IEP which complies with the requirements of IDEA and State regulations.

Discussion:

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DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

Case No. 97-137

FINAL ORDER

[redacted], by and through her parents, [redacted] and [redacted],
Petitioners,

vs.

EAGLE COUNTY SCHOOL DISTRICT RE 50J,
Respondent.

THIS MATTER came before the Independent Hearing Officer (IHO) for a due process hearing upon the Request for Due Process filed by Petitioners, [redacted] and [redacted]. The hearing commenced on September 14 and continued through September 17, 1988. The date for entering a Final Order is November 20, 1998. This date was periodically extended and the hearing continued due to the illness of Petitioners' original legal counsel and other circumstances, including unavailability of witnesses.

Petitioners appeared in person and by Michael W. Breeskin, Attorney at Law. Respondent appeared by attorneys Richard N. Lyons, II and Julie A. Kindert, of the firm of Bernard, Lyons & Gaddis, PC.

ISSUES TO BE DETERMINED

I. Did the Eagle County School District RE-50J ("District") properly implement the May 6, 1997 IEP?

II. Is the document generated in the meeting of October 13, 1997, an Individualized Education Plan (IEP) as provided by law?

After receiving the testimony of fourteen witnesses, including the Petitioners' expert witnesses, and numerous documentary exhibits extending over a three and-one-half day hearing, and after giving such evidence due consideration and such weight and relevance as the undersigned IHO determined was proper, the undersigned IHO makes the following finds of fact, conclusions of law, and order:

FINDINGS OF FACT

The May 6, 1997 IEP and Its Implementation.

[redacted] was a special education student enrolled in the kindergarten program at Avon Elementary School during the 1996-97 school year, and qualified for services under the Individuals with Disabilities Education Act (IDEA).

The required Triennial Eligibility Review was commenced on February 28, 1997, and continued through four more meetings totaling over sixteen hours of staff and parental meetings. The Triennial Review was concluded on May 6, 1997, with the completion of an Individualized Educational Plan (IEP), Petitioners Exhibit B, for [redacted] which listed [redacted]'s Determination of Eligibility to be "Speech-Language Disability."

The IEP included four separate annual goals, each with various short-term instructional objectives with an understanding and agreement of the team, including the parents, that some educational/objectives of the second annual goal would be drafted subsequent to the last team meeting.

Included in the May IEP was a separately prepared, handwritten list of "characteristics of service" which was attached as page 9A of the IEP as "Adaptations/ Modifications/ Accommodations, Petitioners Exhibit B22-24. This list of "characteristics of service" was prepared by Nancy Graham, an Occupational Therapist employed by the Cherry Creek School District, and an acknowledged authority in the field of Sensory Integration Dysfunction. The parents had requested that it be included into the IEP. The team accepted the document as part of the IEP.

Page 9A was reflective of what Ms. Graham viewed as [redacted]'s main hindrance to her education: sensory integration dysfunction. This problem resulted in [redacted] becoming overloaded with too much sensory information for her neurological system to properly integrate. If such situations occur at school, [redacted] needs certain assistance (strategies, techniques or sensory diet) to reachieve a proper level of modulation so that she can participate in her educational and related activities.

Sensory integration dysfunction is not one of the nine disabilities recognized by the Colorado Department of Education as qualifying children for special education services, but it is the cause of [redacted]'s speech/language disability.

On May 13, 1998, with the benefit of the IEP Team, [redacted]'s mother requested that "social stories" be added to the second page of Page 9A as part of the characteristics of service. The addition was made by the District without team participation.

Also, with the understanding and consent of the team, the exact wording of the short term instructional objectives for the second annual goal regarding the improvement of associative thinking skills was agreed upon. The new wording was subsequently added to the IEP without convening another team meeting. These additions/modifications were reflective of the understanding of the parties that the additions to the IEP could be made subsequent to the IEP meeting.

The May staffing notes indicated that a meeting was to be "set up" at the "beginning of next [school] year w/all people who work w/[redacted] in order to design classroom to meet needs."

Amy Vaydik, the new case manager for the 1997-98 school year, and a speech/language specialist, called an IEP Review meeting for September 8, 1997, just after the start of the new school year, to "review goals and objective" and "to look at team planning."

At that September meeting, the team added the beginning and target dates to the May IEP's annual goals and objectives. The meeting's notes reflect that the team "discussed environmental issues in classroom; i.e., dark, quiet, sturdy weights, H20 bottle" and the need to keep [redacted]'s right ear close to the source of the sound. The team also discussed planning for "when [redacted] is in crisis" and getting help "during special events/parties" but the classroom teacher, Ms. Hatsie Hinmon indicated that she felt comfortable with her professional skills in handling sensory overload and that she was "able to get help from Carolyn Neff", the school principal, and from the school psychologist. Ms. Hinmon also indicated that she had read the information on sensory integration which Mrs. [redacted] had presented to her to read. The notes from the September meeting also indicate that the team ratified the decision of Mrs. [redacted] to add "social stories" to the 9A characteristics of service.

The May staffing notes further indicate that Nancy Graham was to be invited to "set up 1st grade classroom."

Nancy Graham could not come to the District until November, 1997, at which time she met with the entire school staff as well as the [redacted] to discuss sensory integration dysfunction in general, and then immediately after that session she met with [redacted]'s IEP service providers, including the school principal, Carolyn Neff.

Thereafter, Brenda Maw's successor as occupational therapist, Andrew Potts, provided whatever guidance he could on the subject of sensory integration to [redacted]'s IEP service providers at the school.

Mr. Potts had never before been employed as an occupational therapist for a school district.

Prior to September, 1997, Ms. Hinmon, [redacted]'s regular classroom teacher, was provided with information regarding sensory integration issues, and had read the materials provided as well as had spoken with Brenda Maw regarding sensory integration in general to educate herself on [redacted]'s difficulties.

Ms. Maw also provided Ms. Hinmon with a form to use regarding a "system of daily written observations to track symptoms of sensory modulation difficulty throughout the school day." However, Ms. Hinmon, after using the form, requested a different form which would be easier to use and more effective in the classroom environment.

Both Brenda Maw and Andrew Potts began devising a new form. By the end of October, a more effective form was developed by Mr. Potts, and it was used daily for the remainder of the school year. The form was even used by substitute teachers when Ms. Hinmon was absent from her classroom duties.

As the 1997-98 school year began, [redacted] was provided with a "regrouping space" which met some, but not all, of the criteria contained in Nancy Graham's "characteristics of service" listed on page 9A. The regrouping space had a bean bag chair and was placed among book shelves for [redacted] to lean against or brace herself. It also was "contiguous with the general classroom to allow [redacted] to continue to attend to teacher instruction" and was situated in such a manner as to allow her to "re-enter general class space in an efficient way." Ms. Hinmon also used a special timer which she set when [redacted] went into the regrouping space and which by its signal reminded [redacted] when she could rejoin the class.

In Mr. Potts initial meeting with the [redacted] the parents objected to the regrouping space which was being utilized and requested a firm box that would block all light and partially block noise, as well as provide more rigid sides than the backs of the bookshelves. Therefore, Mr. Potts designed a new box to be constructed to the parents' specifications. After difficulty obtaining a carpenter, the box was made and delivered approximately six weeks later in November.

Ms. Hinmon also provided [redacted] with assistance "in verbally planning and reviewing her activities and use of free play time or independent work periods" as required by page 9A, and also provided [redacted] with "specific, concrete verbal or visual feedback to [redacted]" to help [redacted] learn "to monitor and label her state of arousal" by using specific hand signals which were suggested by the consultants and Mr Potts. In addition, Mr. Potts implemented a specific "labeling" to help describe the modulation (How Does My Engine Run?").

The IEP team also provided the [redacted]'s independent consultant with the "Africa" study unit which formed a large part of the fall curriculum in first grade. Additionally, the daily observation reports, notebooks, classwork, etc. were sent home to the [redacted] with the understanding that the [redacted] would share them with the [redacted]'s private service providers and consultants. These consultants were Maxine Glazier, Special Education Specialist, Megan Ross, Occupational Therapist, and Judy Herbert Notoro, Occupational Therapist.

Ms. Hinmon worked with [redacted] and the [redacted] to alert her, and them, to educational events which may be "highly stressful or challenging." Ms. Hinmon sent reminders home to [redacted]'s parents about these upcoming events. In addition, she worked with [redacted] in advance of these events.

The May IEP also provided that [redacted] would receive approximately 1.25 hours per week of Speech Language assistance and 2 hours per month from the Resource Teacher. Regarding the Occupational Therapist's services, the team determined that 1.0 hour per week would be sufficient, however, this time was subsequently increased in October, 1997, at a team meeting. These service providers were primarily responsible for the four annual goals set forth in the IEP, and for the implementation of the short term instructional objectives for each goal.

These annual goals were identified as: (1) [redacted] will improve her expressive language skills in order to have successful, on topic conversations with her peers; (2) [redacted] will build associative thinking skills to improve comprehension of age appropriate material; (3) [redacted] will improve self regulation of voice volume; and (4) [redacted] will learn to use gentle touch in interactions with peers and adults.

Amy Vaydik, the new speech/language specialist, was generally responsible for monitoring goals 1 and 2, and Andrew Potts was generally responsible for monitoring goals 3 and 4, but both worked on goal 3 (voice volume).

[redacted] received mostly 2's ("developing") and some 3's ("proficient") on her regular classroom report card throughout the year, although her reading skills were rated below grade level.

[redacted]'s IEP report card for the end of the school year indicated that she received grades of either "met objective" or "satisfactory progress" on all but one of the 10 short term instructional objectives for goals 1, 2, and 3. Regarding goal 4, Mr. Potts wrote that [redacted] had met the purpose of goal 4 and that she met or partially met each of the four short term instructional objectives under goal 4.

Neither service provider recommended extended school year services because there was no evidence of significant demonstrated educational regression by [redacted] over previous vacations and breaks.

In the individual opinions of [redacted]'s regular classroom teacher, the two main service providers, and the school principal (who were charged with overall supervision of the implementation of the IEP), [redacted] made progress towards and even met her annual goals and objectives. Ms. Hinmon testified that whenever [redacted] was out of modulation, she would either allow [redacted] to enter the re-grouping space and/or utilize other strategies and techniques (such as water bottle, pressing on seat, carrying heavy objects, walking, etc.) to bring her into the correct modulation so she could participate in the classroom or other activities.

The October 1997 IEP Meeting

Ms. Vaydik, as case manager, called an annual review meeting for [redacted] to be held on October 13, 1997, because she was of the opinion that the annual review was to be held during the month of October under previous BOCES procedures and practices. In addition, she was of the opinion that several of [redacted]'s annual goals should be "fine-tuned" based upon her observations and working with [redacted] on a weekly basis and upon her conversations with Mr. Potts. Thus, Ms. Vaydik gave notice of an annual review meeting.

Mrs. [redacted] was present on October 13th as were the team members. Ms. Vaydik conducted the meeting and as the team generally discussed [redacted]'s strengths, needs, progress, Ms. Vaydik went through the various items on the form, although she did not state that the team was specifically discussing any particular item on the IEP form. When it came to the listing of annual goals and objectives, three of the four goals from the May IEP were left in tact, and the fourth goal was changed with the consent of Mrs. [redacted]. Goal 3, "learn to use gentle touch," was moved to an objective under Goal 1. A new goal replaced it: "use successful methods of sensory regulation throughout the school day for optimal school performance."

The meeting lasted 1 hour and 45 minutes which was much shorter than any previous IEP meeting with the [redacted]. The participants were up-beat, the meeting was cordial, and it was concluded with the understanding that Amy Vaydik was to consult with Mrs. [redacted] and Nancy Graham to carefully word the educational objectives under the first goal, as had been done in May regarding the working supplied after the IEP meeting adjourned.

Mr. Potts developed the wording of the educational objectives for which he was responsible. Upon receiving the wording from Mrs. [redacted] and after receiving Mr. Potts' input, Ms. Vaydik completed the wording of the educational objectives portion and delivered them to Mrs. [redacted]

Mrs. [redacted] thereafter strongly objected to the label "annual review" for the October 13th meeting. Mrs. [redacted] further asserted in a December 3, 1997, letter to Ms. Huffstetler, District Director of Special Education, that she had never agreed to allow Mr. Potts to write his assigned educational objective. However, Mrs. [redacted] later stated in a subsequent letter to Ms. Huffstetler that "Andrew (Potts) did bring up at the meeting a new sensory goal...As I remember now, he did suggest it and it was received by the team."

Additionally, Mrs. [redacted] made five demands of the District: (1) amend the May IEP to allow for the two new speech goals and objectives as written by Amy Vaydik in the October annual review; (2) increase Andrew Potts time to 1.5 hours per week from the hour in the May IEP; (3) add "tight voice or relaxed voice" to the first voice objective; (4) maintain the start dates and all other "functioning needs, accommodations, and sensory integration goals and objectives" from the May IEP; and (5) establish future annual review date of May, not October.

In response to these demands, Ms. Huffstetler explained in her letter of December 9, 1997, to Mrs [redacted], that (1) the two new speech goals written by Amy Vaydik would automatically be implemented because the October IEP would be the new IEP; (2) Mr. Potts' time would be automatically increased per the October IEP; (3) the requested new addition to the October IEP's voice objective could be added, but would require another team meeting which could be scheduled; (4) the start dates could not be backdated but that the completion dates could be established as May, 1998, and (5) the annual review date could be established as May, not October.

By letter dated December 10, 1997, Mrs. [redacted] rejected this offer and stated that she would be filing for a due process hearing.

The following day, Carolyn Neff offered to reconvene the team to address the issues which needed a team decision under IDEA, but Mrs. [redacted] refused to accept the offer of another team meeting and said she was going to file for due process.

Finally, by letter dated December 15, 1997, Ms. Vaydik, as team manager, wrote Mrs. [redacted] to explain the circumstances and situation as she understood it, and once more offered to reconvene the team to resolve these issues. Again, Mrs. [redacted] refused and filed her request for a due process hearing.

DISCUSSION

As set forth in the Pre-Hearing Order, the issues to be determined are two: (1) whether the District properly implemented the May 6, 1997, IEP; and (2) whether the document generated in October, 1997, collectively constituted an IEP as provided by law. Both issues are to be decided within the context of whether these actions denied [redacted] a free and appropriate public education.

In meeting its legal obligation under IDEA to provide students with disabilities with a free and appropriate education, a school district must first adhere to the procedural requirements of IDEA to develop an IEP with parental participation, and second, insure that the IEP is calculated to provide educational benefit to the student. *Board of Education v. Rowley*, 458 US 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In this instance, the Petitioners and the District agree that the May 6, 1997, IEP was appropriately developed with parental input, but disagree as to whether it was implemented contrary to the dictates of 34 CFR Sec. 300.350 which states in part that "*Every public agency must provide special education and related services to a child with a disability in accordance with an IEP*" [emphasis added].

> *agencies and teachers from making good faith efforts to assist the child in achieving the goals and objectives listed in the IEP. Further, this section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.*

In this instance, the Petitioners were evidently of the opinion that the District was not making a good faith effort to implement the IEP so that their child would achieve the annual goals and educational objectives listed in the IEP. Therefore, as explained by this note to the regulations, and authorized by IDEA, the Petitioners filed for due process.

However, the IHO concludes after considering all of the evidence presented, including testimony and exhibits, that the District and its personnel did utilize its good faith efforts to implement the IEP, even though its efforts were not to the degree or to the level expected or demanded by the Petitioners. The designated specialized service providers (Ms. Vaydik and Mr. Potts) provided their respective services as required by the IEP and, in fact, spent more time on [redacted]'s particular circumstances than was legally required of them by the IEP. Ms. Hinmon, the classroom teacher, performed her tasks in good faith and, as the testified, "as best she could" under the circumstances. She received in-service training and read the materials provided to her by the parents regarding sensory integration issues. She worked with Mr. Potts to learn to recognize when [redacted] was out of modulation and then in good faith attempted to, or did in fact, implement the various strategies and techniques to bring [redacted] into modulation or to prevent her from continuing to increase her level of hypersensitivity. Although there was testimony with respect to several instances when [redacted] was observed by others to be out of modulation in and out of the school setting, this does not prove that the District failed to implement the IEP. It simply establishes the fact that [redacted] as characterized by her swim coach, has good days and bad days. The issue is whether the District attempted in good faith to utilize the strategies and techniques to bring [redacted] into modulation so she could benefit from her education. The IHO finds that the District did implement those strategies and techniques in good faith even though not to the degree or extent expected or demanded by the parents.

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does not prove that the District failed to implement the IEP. It simply establishes the fact that [redacted], as characterized by her swim coach, has good days and bad days. The issue is whether the District attempted in good faith to utilize the strategies and techniques to bring [redacted] into modulation so she could benefit from her education. The IHO finds that the District did implement those strategies and techniques in good faith even though not to the degree or extent expected or demanded by the parents.

Petitioners attempt to also prove non-implementation of the May 6 IEP by arguing that [redacted]'s progress was nil. They reason that if no progress was made, it is proof positive that the District failed to implement the IEP's educational objectives. However, as noted above in the findings of fact, it is impossible to totally reject the progress and achievements as individually documented and measured by the District's classroom teacher, speech/language specialist, and occupational therapist and to conclude that [redacted] made absolutely no progress whatsoever as Petitioners' professional witnesses would have us believe. Such a strained and illogical conclusion cannot be drawn from the facts.

A more logical conclusion to be drawn, and one that is strongly suggested by the evidence including the testimony that [redacted] is very susceptible to environmental stimuli, is that [redacted]'s behavior when she is with Ms. Glazier is distinctly different than when she is with her classmates in the classroom with her regular teacher or with District service providers in the regular school environment. This would, for example, explain why Ms. Vaydik concluded that [redacted], when measured in her regular school environment, made "satisfactory progress and almost met objective" (regarding the first objective of the second annual goal of 100% accuracy three out of four times) [Exhibit WW-2], whereas Ms. Glazier's measurements indicated that [redacted] only scored 90%, 60%, 67%, and 50% in various tests, and, therefore, concluded that no progress had been made. [Exhibit E-6 & 7]

However, regardless of the extent or exact degree of progress made on any of the annual goals or on any of the multitude of educational objectives, the District is not responsible under IDEA for lack of progress, whether that lack of progress is real or simply perceived. Federal regulations, 34 CFR Sec.

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300.350, make this clear as do applicable judicial decisions. As explained in *Urban v. Jefferson County School District*, 89 F3d 720 at 725 (10th Cir. 1996), the "appropriate education" required by IDEA is not one which is "guaranteed to maximize the child's potential." Perhaps this legal doctrine is best expressed in the decision of *Doe v. Board of Education of Tullahoma City Schools*, 9F.3d 455 at 459 (6th Cir. 1993) wherein the court clearly stated that IDEA only requires schools to provide the educational equivalent of a serviceable Chevrolet, and a school district "is not required to provide a Cadillac." If the IEP is reasonably calculated to provide educational benefits to [redacted] and the District in good faith implements the IEP, then it is in compliance with the requirements of IDEA. *Board of Education v. Rowley*, 458 US 176, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982).

As further explained in *Urban v. Jefferson County School District*, 870 F.Supp. 1558, at 1562, (D. Colo. 1994), *aff'd* 89 F.3d 720 (10 Cir. 1996), the purpose of IDEA is to "provide a floor, not a ceiling." Here, Petitioners are arguing that [redacted] could have progressed more if the District had fully and completely devoted all of its efforts to strictly comply with the IEP at all times, commencing on Day One of the school year. This may be true. But it is not the proper measurement of the District's responsibility. Undoubtedly, a Cadillac IEP and services *could* have helped [redacted] progress more than she did, but that is not the legal issue to be decided herein. The District is only required to undertake good faith efforts to implement the IEP. The evidence adequately demonstrated that the District made a good faith effort to assist [redacted] in achieving the objectives listed in her IEP. As explained in *O'Toole v. Olathe School District*, 963 F.Supp. 1000, at 1014 (D.Kan. 1997) if this is done, then that is all that is required.

This legal doctrine is specifically applicable to the issue of whether the District substantially complied with the IEP by its provision of the characteristics of services found on page 9A of the May IEP. Again, immediate, strict, rigid, and unbending technical compliance is not mandated by IDEA or enforced by the courts. Technical noncompliance must result in a substantial loss of educational opportunity for it to constitute a violation of a free and appropriate education. *Urban v. Jefferson County School District R-1*, 89 F.3d 720 (10th Cir. 1996).

As the staffing notes indicate, the parties themselves had contemplated that the team would reconvene in the fall to review the classroom environment and the needed accommodations and modifications, such as seating [redacted] so that her right ear faced the teacher. The notes did not indicate that these were to be done over the summer months and be implemented on Day One. Nowhere in the IEP or in the characteristics of service were exact dates inserted for implementation of 9A.

Turning to the requirements of 9A, the final version of the form utilized by the classroom teacher to document [redacted]'s state of modulation and to provide a helpful listing of the strategies and techniques to bring her into, or keep her in, a state of modulation was developed by the OT and the classroom teacher over the course of two months by trial and error. The use of the word "develop" in 9A indicates that the document was not necessarily to be finalized before the start of school, cast in stone, and never again be modified. Such a requirement would, as noted in *Urban, supra*, glorify procedure over substance and would probably be to [redacted]'s detriment. Finally, any failure within the form itself to document any particular instance does not constitute a violation of [redacted]'s rights. The failure to document the provision of a required service is not a violation of IDEA and does not deny a student a free appropriate education if school personnel actually provide the services, even though documentation may technically be required by the IEP. *Churan v. Walled Lake Consolidated Schools*, 839 F. Supp. 465 (E.D. Mich. 1993), *aff'd* 51 F.3d 271 (6th Cir. 1995). Because the evidence demonstrated that Hatsie Hinmon did utilize the strategies and techniques, the failure on her part to document each and every instance does not arise to a violation of a free and appropriate education.

So, too, the in-service training and cooperation with outside consultants did occur although not to the degree desired by the parents. The District cannot be penalized because Nancy Graham was unavailable until November, 1997, to conduct the in-service. Also, the development of the time-out box substantially complied with the requirements of 9A. A regrouping space and a timer were available on Day One and the classroom teacher testified that [redacted] utilized them effectively even though the space did not technically and strictly comply with each and every one of Nancy Graham's specifications. Furthermore, the new box, (which was in total compliance) was designed in September, built in October, and delivered in November. The District demonstrated good faith in fulfilling this requirement.

Even if the delay in obtaining the box (or in the provision of any of the other characteristics of service) can be attributable to the District, the courts have approved such a delay by the school in effectuating an IEP while initially concentrating on acclimation, socialization, and adjustment, as long as the IEP has not been totally abandoned. *See, Independent School District No. 283, St. Louis Park, Minnesota v. S.D.*, 948 F.Supp 860, 888 at footnote 36 (D. Minn. 1995). Hereto, [redacted] was greeted by a new classroom teacher, a new speech/language specialist, and a new occupational therapist. As much of the testimony explained, [redacted] has difficulty with any changes in her environment. A period of stabilization is not unreasonable under the circumstances.

Regarding the document produced from the October 13, 1997, meeting, it meets all of the criteria of an IEP required by state regulations. Again, the courts do not glorify procedure over substance, and have consistently held that procedural noncompliance will be deemed violative of IDEA if, ad only if, such noncompliance results in a substantial deprivation of rights. *See Urban v. Jefferson County School District*, 89 F.3d 720, at 726 (10th Cir. 1966).

In *Doe v. Defendant I*, 898 F.2d 1186, at 1190 (6th Cir. 1990), the court examined the circumstances of an IEP meeting and concluded that despite the failure of the team to write into the IEP the student's present educational performance or to include into the IEP any criteria to determine whether educational objectives were being achieved, did not invalidate the IEP because the team, including the parents, had all of the information required by IDEA, including the student's most recent grades and the understanding that he was to be graded under the normal classroom grading process. So too here, the Mrs.

Mrs. [redacted] also concurred with tie IEP team's drafting of a new goal, and, in fact, even subsequently demanded of Ms. Huffstetler that the new goal be immediately implemented. Because Mrs. [redacted] had fully participated in the process and concurred to the changes suggested by the team and even assisted in drafting the exact wording of some of the objectives, the purpose of parental inclusion in the IEP process was achieved. The Petitioners cannot pick and choose what process they prefer. The annual goals cannot be changed without an annual review conducted by the team. Accepting the change but not wishing to call it an annual review is not within the parents' prerogative. They cannot demand implementation of the changes and yet demand that the meeting be called something that it wasn't.

Furthermore, when additional changes were demanded and the District offered yet another meeting, the parents refused to participate. The IHO cannot help but wonder if this entire due process hearing could have been avoided had the parents agreed to one more meeting of the team in early December, 1997, to determine the name and purpose of the October meeting, the scope of the changes demanded by the parents, and the dates for future meetings.

CONCLUSIONS OF LAW

The IHO hereby concludes as follows:

I. The District implemented the May 2, 1997, IEP in good faith.

II. The document produced after the October 13, 1997, meeting is a valid IEP which complies with the requirements of IDEA and State regulations.

ORDER

The IHO hereby orders as follows:

I. The District will reconvene an annual review meeting to review [redacted]'s IEP with appropriate notice to her parents, date of said meeting will be on a Friday.

II. In view of the history of misunderstandings, disagreements and differences of opinion between the District and its employees and [redacted]'s parents and their outside consultants, the District will

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II. The document produced after the October 13, 1997, meeting is a valid IEP which complies with the requirements of IDEA and State regulations.

ORDER

The IHO hereby orders as follows:

I. The District will reconvene an annual review meeting to review [redacted]'s IEP with appropriate notice to her parents, date of said meeting will be on a Friday.

II. In view of the history of misunderstandings, disagreements and differences of opinion between the District and its employees and [redacted]'s parents and their outside consultants, the District will arrange for the facilitation of this meeting through the Colorado Department of Education Special Education Services Unit at the District's expense.

III. In view of the IHO's findings and conclusions concerning the two IEP's, the request for "compensatory education" is hereby dismissed.

IV. Because of the relatively short time involved between this Order and when a new IEP is developed, and because it would serve no purpose for the District to implement the October 13, 1997 IEP for this short time period, the IEP of May 6, 1997, shall be the operative IEP until the new IEP is developed and implemented.

Done this 18th day of November, 1998.

Richard G. Fisher

Richard G. Fisher
IMPARTIAL HEARING OFFICER
3686 South Forest Way
Denver, Colorado 80237-1015

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 1998, a true and correct copy of the foregoing Final Order was placed in the United States Mail, postage prepaid, addressed to the following:

[redacted]

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Eagle County School District RE 50J
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Attention: Jane Huffstetler, Dir. of Special Education

Jennifer Rodriguez
Special Education Services Unit
Colorado Department of Education
201 East Colfax Avenue
Denver, Colorado 80203-1704

Case No.: **S97:137**

Status: State Level Review

Key Topics: Individual Education Plan (IEP) Implementation
Free Appropriate Public Education (FAPE)
Compensatory Education

Issues:

- Did the District fully and timely implement the Individualized Education Program developed at the 1997 Triennial Review in May 1997?
- If the District did not fully and timely implement the May 1997 IEP, was the Student denied a free appropriate public education?
- Was the document created after the October 1997 meeting a valid Individualized Education Program?
- Did the District violate the IDEA by failing to timely provide the parents information after a request?

Decision:

- The District did not fully and timely implement the May 1997 IEP.
- Preponderance of the evidence indicates that the Student benefited educationally during the 1997-98 school year. The District provided the Student with more than a basic floor of educational opportunity. The District did not deprive the Student of a free appropriate public education.
- The District did not implement the October 1997 IEP and the procedural non-compliance did not result in any substantial deprivation to the Student. Therefore the procedural non-compliance was not a violation of the IDEA.
- The District continued to operate under the May 1997 IEP. The failure to respond did not affect that IEP. The non-compliance with the access requirement did not result in a substantial depravation of the Student's right to a free appropriate education. Therefore this procedural non-compliance was not a violation of the IDEA.

Discussion:

- The Student's request for compulsory education for the District's failure to properly implement the May 1997 IEP is denied.
- The District did not provide the Student's parents proper notice of the October 1997 annual review as required by the IDEA. The District shall provide the Student's parents proper notice of any further annual reviews.
- The District did not provide information after requested by the parents as required by the IDEA. The District shall provide the parents information properly requested.

Before the Division of Administrative Hearings
State of Colorado

Case No. **ED 98-17** S97-137

Decision Upon State Level Review

[redacted], by and through her parents, [redacted] and [redacted]
Petitioners-Appellant

v.

Eagle County School District RE 50J
Respondent-Appellee.

This matter is a state level review of a decision of an Impartial Hearing Officer[1] after a due process hearing pursuant to the Individuals with Disability Education Act, (IDEA) 20 U.S.C. §§ 1400 *et. seq.* A local level evidentiary hearing was held before an impartial hearing officer in accordance with the IDEA over four days in September 1998. A "Final Order" was issued on November 18, 1998, in Case No. 97-137.

An appeal was filed by [redacted] (Student) through her parents [redacted] and [redacted].[2] Neither party requested the opportunity to present additional evidence, and no additional evidence was received. A transcript of the September 1998 hearings has been filed. The parties submitted their briefs and authority by March 16, 1999, and the matter was ready for an order on that date.

The Student and the Student's parents were represented by counsel Michael Breeskin. The Appellee, Eagle County School District RE 50 J (District) was represented by counsel Richard N. Lyons, II.

Scope of Review

The decision of the Administrative Law Judge on state level review of the decision of an Impartial Hearing Officer is to be an independent decision. IDEA 20 U.S.C. § 1415(c) and (d); 34 CFR § 300.510; State Plan, Part II, A, VII, B, 9, b; and 2220-R-6.03(11)(b)(v) (1 CCR 301-8). The IDEA also provides that court reviewing a state level decision shall render an independent decision. IDEA §1415(e). Cases construing this provision have held that in conducting such review courts must give "due weight" to the findings at the state level. *Board of Education of Hendrick Hudson*

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Central School District v. Rowley, 458 U.S. 176 (1982); *Doe v. Board of Education of Tullahoma City Schools*, 9 F3rd 455, (6th Cir., 1993). The reviewing agency must, while according the hearing examiner's decision due weight, independently decide based on a preponderance of the evidence whether the district has satisfied the requirements of IDEA. *Sioux Falls School District v. Koupal*, 526 NW 2d 248 (S.D. 1994). It is appropriate to apply this standard by analogy in the state administrative review level.

Impartial Hearing Officer Decision:

The Impartial Hearing Officer, in his decision of November 18, 1998, determined that:

1. The District implemented the May 2, 1997, Individualized Education Program (IEP) in good faith; and

2. The document produced after the October 13, 1997, meeting was a valid Individualized Education Program.

The Impartial Hearing Officer denied the Petitioners their request for compensatory education.

Issues on Review:

1. Did the District fully and timely implement the Individualized Education Program developed at the 1997 Triennial Review in May 1997?

2. If the District did not fully and timely implement the May 1997 IEP, was the Student denied a free appropriate public education?

3. Was the document created after the October 1997 meeting a valid Individualized Education Program?

4. Did the District violate the IDEA by failing to timely provide the parents information after a request?

Findings of Fact:

1. The Student was born in 1990. She was diagnosed as having a sensory integration disorder in July of 1993. After the diagnosis, the Student received occupational therapy for six months.

2. In January 1996 the Student was evaluated at the Child Development Unit of The Children's Hospital in Denver. There it was determined that the Student was suffering from an auditory processing dysfunction, sensory motor integration dysfunction with difficulty modulating sensory input and output, and an additional

sensory disorder, with significant dyspraxia. These problems were found to have an impact upon her ability to learn.

3. The Student also has difficulty with sensory defensiveness and modulation of her central nervous system.

4. Sensory defensiveness is an overworking of one's normal protective mechanisms. One tends to respond to neutral stimuli as something from which protection is needed, causing one to move out of central nervous system homeostasis or modulation. Learning best takes place where one is in homeostasis.

5. Modulation is the ability of the central nervous system to input and decide if the input has relevance or value. Modulation is the ability to ignore input if it does not have relevance or value. An individual can be out of modulation in two ways: the individual could be in an under-aroused state, characterized by lethargy; or the individual could be in an over-aroused state, characterized by hyperactivity.

6. The Student's sensory integration disorder has resulted in a speech-language disability. The Student qualifies for services under the IDEA.

7. The Student began attending Avon Elementary School in the Fall of 1996. The Student had an Individualized Education Program prior to beginning her attendance at Avon.

8. Meetings were held to develop the Triennial Review Individualized Education Program on February 28, March 14, March 31, and May 6, 1997.

9. Nancy Graham is an occupational therapist for the Cherry Creek School District. She observed the Student in class in March of 1997 upon the request of the District. The Student grabbed the forearms of other children with such force that other children pulled away from her. The Student's voice was louder than that of the other children. These actions are consistent with a child who has sensory integration problems. Ms. Graham consulted with both the District and the Student's parents.

10. At the May 6, 1997, Triennial Review meeting the Student's mother asked that the Characteristics of Service drawn up by Ms. Graham be made part of the Individualized Education Program. The Characteristics of Service were accepted as part of the Individualized Education Program at that time.

11. The May 6, 1997, Individualized Education Program contained four separate annual goals, each with various short term instructional objectives. The annual goals were identified as: (1) the Student will improve her expressive language skills in order to have successful on topic conversations with her peers; (2) the Student will build associative thinking skills to improve comprehension of age appropriate material; (3) the Student will improve self regulation of voice volume; and (4) the Student will learn to use gentle touch in interactions with peers and adults. The parents and the District

agreed that some objectives of the second annual goal would be drafted or modified after the meeting.

12. Upon the suggestion of Ms. Graham, the Physical/Motor and Physical/Health sections of the IEP included eye contact, posture, forced jaw, toe walking, forced smile, forced pressure, wandering and touch radiating movement.

13. The needs section of the Student's IEP was supplemented to include postural concerns such as jaw, trunk rotation, pressure, toe walking and eye contact.

14. The Triennial Review was concluded on May 6, 1997, with the completion of an Individualized Education Program. The parties agree that the IEP was appropriate under the IDEA and the A.L.J. so finds.

15. At that final meeting for the Triennial Review the Student's mother asked when the next annual review would be held. She was advised that the next annual review would be held in May 1998.

16. The Student's mother was concerned about the Student's hearing. In May of 1997, the Student's mother suggested that the Student be examined by an audiologist. The examination was completed by the end of May.

17. Lisa Cannon, the District's hearing specialist, reviewed the audiologist's report at a September 8, 1997, meeting. The report showed that the student had hearing difficulty. It was decided that the Student should have preferential seating with the right ear towards the instructor and an unobstructed view of the instructor. Elimination of background noise was discussed, and it was determined that the Student should have an individual study area with the use of ear plugs or ear muffs as needed. The Student's mother suggested that ear plugs be available for the Student at school. It was agreed that these recommendations be added to the IEP. There is no evidence that the District ever provided ear plugs to the Student.

18. The first paragraph of the Characteristics of Services stated that the District will provide an inservice and ongoing consultation to all school personnel involved with the Student so that they can identify and respond to her needs.

19. Hatsie Hinmon, the Student's regular classroom teacher, was provided with information regarding sensory integration issues prior to the start of the school year in September 1997. She was provided a pamphlet titled "A Parent's Guide to Understanding Sensory Integration". She read that material at the beginning of the school year. The classroom teacher also consulted with Brenda Maw, an occupational therapist for the school district and with Laura Alexander-Clapp, a special education teacher. Brenda Maw left her employment with the District and was replaced by Andrew Potts. Andrew Potts consulted with the classroom teacher and other providers for the Student. Meetings attended by the Student's teachers and service providers were held at least every two weeks.

20. An inservice was held for all school personnel on November 17, 1997. The inservice was conducted by Nancy Graham and Andrew Potts, an occupational therapist for the District. They spoke on sensory integration dysfunction and other issues. The Student's name was not specifically mentioned. After that meeting Ms. Graham then attended a meeting with the Student's service providers to discuss specific issues around the Student.

21. The District complied with the Student's Characteristics of Service requirement to consult and hold an inservice regarding the Student and her needs.

22. The Characteristics of Service required the District to develop a system of daily written observation to track symptoms of sensory modulation difficulty throughout the school day and to facilitate objective communication and collaboration between school, home, and community.

23. In the beginning of the school year in September 1997 a form was used that was titled "Signs of Sensory Overload". Ms. Hinmon requested a different form. A form was then developed and used after October 23, 1997 titled in part "Schedule with Sensory Diet". Ms. Hinmon requested a new form be developed because there was little space on this form for making observations. The new form titled "Daily Observations & Schedule for Sensory Diet" was developed and first used on December 2, 1997. That form with some minor changes was used for the remainder of the school year. This latest form had a column for "Observation" and a column for "Activity". The Student's mother testified that this Characteristic of Service was implemented by mid-December 1997.

24. The District complied with the Student's Characteristics of Service requirement to develop a system of daily written observation.

25. The Characteristics of Service provided that the District would establish a re-grouping space in the Student's classroom and other areas of the school where she demonstrated difficulty with sensory modulation, "ie music room?" The re-grouping space was to have effective blocking of noise, minimal visual stimulation, and minimal light touch stimuli. In addition, it was to be sturdy enough to allow leaning or bracing against for proprioceptive input, with a beanbag chair or comparable surface for deep pressure and was to be placed contiguous with the general classroom.

26. Proprioceptive input pertains to the awareness of movement and location of one's body.

27. A regrouping space, quiet box, or time-out area allows a reduction of sensory stimuli that a person with sensory defensiveness needs to have a break and move back into modulation to be available for learning. The regrouping space is not to be used for discipline of a child with problems of sensory integration.

28. A section of the Student's classroom was set up as a regrouping space at the beginning of the school year. At a meeting on September 6, 1997, it was discussed that the regrouping space was not adequate. By late September a regrouping space was established in a corner of the classroom. It had a bean bag chair. It was away from the group, so there was less noise. The chair could be arranged so the Student could press her feet against the wall. The space was next to a bookshelf and was near windows so it was light and had some visual stimulation.

29. This regrouping space in the corner of the classroom was not sufficient because of the noise, the visual stimulation, and inadequate bracing. The Student often went and sat in the hallway or locked herself in the bathroom to reduce sensory stimuli when she was out of modulation. As a result the Student was losing more time than necessary from the classroom.

30. At the end of September Mr. Potts and the Student's parents met and determined that a better space could be built. A box was designed, built and installed in the classroom by November 12, 1997. The box met all of the requirements for the regrouping space.

31. The Student had problems with sensory modulation in the music room. There was no regrouping space in the music room. At times the Student would sit on the floor in the hallway outside the music room. The hallway did not satisfy the requirements for a regrouping space. There was no evidence introduced to explain why the Student could not or did not use the regrouping space in the classroom when she had problems with sensory modulation in the music room.

32. The District partially complied with the Characteristic of Service that provided for a regrouping space.

33. The Characteristics of Service required the District to develop a method for the Student to monitor the length of time she has been in the regrouping space and to hold her accountable to re-engage with the larger group.

34. Ms. Hinmon, the classroom teacher, had a countdown timer that was attached magnetically to her filing cabinet near her desk. The timer would make a noise to cue the Student when it was time for her to re-engage with the larger group.

35. The District complied with the requirement to develop a method for the Student to monitor the length of time she was in the regrouping space.

36. The Characteristics of Service required the District to assist the Student in verbally planning and reviewing her activities and using free play time or independent work periods.

37. Ms. Hinmon, the classroom teacher, would tell the Student what her options were. The Student would choose the activity and then go and do the activity. Ms.

Hinmon would follow this procedure in dealing with all of her Students. Ms. Hinmon did not notice that the Student had any difficulties in planning or using her free play time.

38. The District complied with the Characteristic of Service that required the District to assist in verbally planning and reviewing her activities.

39. The Characteristics of Service required the District to provide specific, concrete verbal or visual feedback to the Student at regular intervals through the day to help her learn to monitor and label her state of arousal. The District was to develop a consistent vocabulary for labeling her state of arousal and to provide positive reinforcement for attempts to verbally report her state and needs.

40. At a meeting on September 26, 1998, with the Student's parents and Andrew Potts, the parents mentioned that they used terminology from the Engine Program to label the Student's state of arousal. In that program one's state of arousal is labeled as "high, just right, and low". Mr. Potts agreed to the use of that terminology.

41. Ms. Hinmon would use a hand signal to cue the Student to lower her voice. She also gave the Student positive reinforcement. However, Ms. Hinmon stated that she would use several different labels and that she wished the school was more consistent. Mr. Potts, the District's occupational therapist, noted on November 18, 1997, that he still needed to get started on specific feedback.

42. Sometime thereafter, Mr. Potts and the classroom teacher adopted the terminology of the Engine Program to describe the Student's state of arousal. Her state of arousal was labeled as "high, just right, and low". Feedback was provided to the Student to help her learn to monitor and label her state of arousal.

43. The District complied with the Characteristic of Service to provide specific, concrete verbal or visual feedback and to develop consistent vocabulary for labeling the state of arousal or sensory overload.

44. The Characteristics of Service required the District to develop a plan for communication between the classroom teacher and private therapists to allow private providers to preview upcoming curriculum in order to allow private providers to work with the Student on key vocabulary and concepts.

45. Ms. Hinmon provided curriculum guides and unit outcomes to Maxine Glazer, a certified special education teacher who worked with the Student. These materials were not helpful to Ms. Glazer.

46. The Student began a study unit on Africa in January 1998. Ms. Glazer was not provided a list of concepts or vocabulary that would allow her to work with the Student on understanding key vocabulary and concepts for the study of Africa.

47. The District only partially complied with the Characteristic of Service that required the District to develop a plan for communication between the classroom teacher and private therapist.

48. The Characteristics of Service required the District to anticipate highly stressful or challenging activities and events and plan for the Student to prepare for them with assistance.

49. The District planned on having items available to the Student to assist her in reaching and maintaining sensory modulation in connection with stressful and challenging activities. These included a water bottle, fidget toys, a snack, and ear plugs.

50. Ms. Hinmon would work with the Student before stressful events. Before a field trip to the fire department, Ms. Hinmon explained that she might hear a loud siren and told the Student she could put her hands over her ears. Ms. Hinmon did not bring ear plugs for the Student for the field trip.

51. The class had a ski lesson in January of 1998. The Student's parents requested special accommodations for the Student's disability on the trip permission form and returned the trip permission form to the school. However, the ski area was not aware of the requested special accommodations when the Student arrived for her ski lesson.

52. The Student went with her class to a Hans Brinker story program at the Vivar Center. At the end of the program the Student was crying and agitated.

53. Later in the year the Student went with her class to a music event at the Vivar Center. The Student got out of modulation. Ms. Hinmon had the Student press against the back of her chair and cover her ears, but these measures did not help. Ms. Hinmon took the Student out to the hallway to go to the bathroom, get a drink, and walk stairs. The Student's parent intervened and took action to get the Student back into modulation. Ms. Hinmon did not have anything with her to help the Student get back into modulation.

54. The Student attended a talent show at the school. The Student acted wild at this event.

55. The classroom teacher did not have earplugs available for the Student for the trip to the firehouse. The District did not adequately prepare for the ski trip. The classroom teacher did not have earplugs or anything available to help the Student at the music event at the Vivar Center. The District only partially complied with the Characteristic of Service that required the District to anticipate and prepare for stressful events.

56. Annual Goal # 1 of the Individualized Education Program was for the Student to improve her expressive language skills in order to have a successful, on topic

conversation with her peers. Short term objective A provided that the Student, with no verbal prompting, will successfully engage in a topical conversation at least one time during monitored conversation with her peers for three consecutive recording days using an identified and pre-taught conversation starter.

57. The Student was observed to engage in an on topic conversation and was able to successfully elaborate on a conversation with her 'buddy', a student from a higher grade. The conversation was about living things, which the class was studying. The parents expected this goal to relate to conversations about things not related to school. However, the annual goal is not so limited as it was written.

58. The Student was to be taught conversation starters. She was to learn to start a conversation by asking other students about things in their lives outside the classroom. The Student was not pre-taught conversation starters. It was not shown that the Student was able to start a conversation about something other than what was immediately happening at school. The Student did not progress in her ability to initiate conversations with her peers. The Student did not meet this short term objective A of Annual Goal # 1.

59. Short term objective B of Annual Goal # 1 was to elaborate during a conversation with her peers at least five times during a five minute conversation with no verbal prompting. The Student was not observed elaborating during a conversation without verbal prompting. The Student did not meet this short term objective.

60. Annual Goal # 2 of the Individualized Education Program was for the Student to build associative thinking skills to improve her comprehension of age appropriate material.

61. Short term objective A for Annual Goal #2 stated that the Student will name items in a category with 90% accuracy three out of four times for three consecutive sessions. The Student made progress in this short term objective A. She was able to accurately name items in a category three out of four times in only two sessions. The Student did not name items in a category three out of four times on three consecutive sessions.

62. Short term objective B for annual goal #2 was for the Student to place objects or pictures into appropriate categories with 100% accuracy for three out of four times on three consecutive recorded days. The Student was able to do this only for pictures and categories she had been previously taught. The Student did not make significant progress on this objective.

63. Short term objective C of Annual Goal #2 was to state similarities or differences in composition, function and location. The Student could only state similarities or differences in color or shape, and did not meet this annual goal.

64. Short term objective D of Annual Goal #2 was to answer questions age appropriately emphasizing higher level language skills with no visual prompt. The Student was not able to meet this goal.

65. Annual Goal # 3 of the Individualized Education Program was for the Student to improve self regulation of voice volume. The Student improved her self regulation of voice volume in the third and fourth quarters of the school year. The Student was able to self regulate her voice volume except when she was out of modulation. The Student met the goal of improving self regulation of voice volume.

66. Annual Goal #4 of the Individualized Education Program was for the Student to learn to use gentle touch in interactions with peers and adults. The Student met this goal by the end of the 97-98 school year.

67. The Student's mother received notice of the annual review meeting to be held on October 13, 1997, from Amy Vaydik, a speech language therapist employed by the District who worked with the Student. The Student's mother questioned the need for an annual review when the Individualized Education Program had been approved less than a year before. Ms. Vaydik took the notice back and left the room to check on the need for an annual meeting. Ms. Vaydik returned to the room with a note attached to the notice of the annual meeting. The note said "I will check & see if we need an Annual. If not, we could meet anyway to discuss changes that are needed."

68. The Student's mother did not hear back from Ms. Vaydik or anyone else from the District as to whether or not the meeting was to be an annual review. The Student's mother went to the meeting not expecting that it would be an annual review. She was advised at the meeting that it would be an annual review. Had the Student's mother expected an annual review, the Student's mother would have arranged for the Student's father and some of the Student's private providers to be present.

69. An Individualized Education Program was drawn up after this meeting in October 1997. The Student's parents objected to the IEP and requested a due process hearing. The District did not use this new IEP, and instead continued to operate under the May 1997 Individualized Education Program.

70. The parents made a written request to Jane Huffstetler on December 3, 1997, for written documentation of implementation of the May 1997 Individualized Education Program. Jan Huffstetler is the District's coordinator for special education. The documents were not provided until February 1998.

71. Objective 4(a) of the proposed October 1997 Individualized Education Plan was for the Student to 'participate' in a sensory diet. On December 10, 1998, the Student's mother asked Andrew Potts how he would measure the goal to 'participate'. Mr. Potts did not respond to that question.

72. The Student received mostly 2's (developing) and some 3's (proficient) on her regular classroom report card throughout the year, although her reading skills were below grade level.

73. In her music class, the Student went from "developing" in the first quarter of the 97-98 school year, to "proficient" the second through fourth quarter in music.

74. In the first and second quarter in the "writes and speaks with correct conventions" and "applies thinking skills to reading and writing" sub-categories of the language arts performance standards, the Student went from "not yet evident" to "developing".

75. The District's designated specialized service providers, Ms. Vaydik and Mr. Potts, provided services as required by the Individualized Instruction Program and spent more hours than was required by the Program.

76. Ms. Hinmon, the Student's classroom teacher, performed her tasks as best she could. She used good faith efforts to assist the Student in meeting the goals and objectives of her Individualized Instruction Program.

Conclusions of Law

1. Did the District fully and timely implement the Individualized Education Program developed at the 1997 Triennial Review in May 1997?

The May 1997 Individualized Education Program was agreed to by the parties. It provided for a free appropriate education for the Student. The Student's parents assert that the May 1997 IEP was not appropriately implemented resulting in the denial of a free appropriate public education. The Impartial hearing officer held that the District did properly implement the May 1997 IEP. After giving due weight to the decision of the Impartial Hearing Officer, I reach a different conclusion.

Most of the items in the May 1997 Individualized Education Program were provided by the District. The District consulted and held an inservice regarding the Student and her needs. The District developed a system of daily written observation. A regrouping space was provided the Student in her classroom. A system was developed to monitor the time the Student spent in the regrouping space. The District assisted the Student in planning and reviewing her activities. The Student's providers gave specific, concrete, verbal and visual feedback and developed a consistent vocabulary for labeling the Student's state of arousal or sensory overload.

The District fell short of some elements of the May 1997 Individualized Education Program. No earplugs were ever provided to the Student. No regrouping space was provided the Student in the music classroom, where she had difficulty with sensory modulation. The classroom teacher did not provide the Student's private providers with vocabulary so they could coach the Student before or at the time the material was taught in the classroom. The District did not always anticipate and prepare for highly stressful activities to the Student. The Student was not taught conversation starters.

The District delayed in providing some of the elements of the May 1997 Individualized Education Program. The inservice was not held until November, more than two months after the school year started. A regrouping space in the classroom that met the requirements of the Characteristics of Service was not provided until mid-November. A consistent vocabulary to teach the Student to label her state of arousal was not developed until December 1997.

It is concluded that the District did not fully and timely implement the May 1997 Individualized Education Program.

2. If the District did not fully and timely implement the May 1997 IEP, was the Student denied a free appropriate public education?

The IDEA, 20 U.S.C. §§1401 *et seq.*, requires the District to provide each child with a disability with a free appropriate public education, tailored to the unique needs of the child through the establishment of an individualized educational program for such child. 20 U.S.C. §1401(20). The Impartial Hearing Officer found that the Student was not denied a free appropriate public education. After giving due weight to the decision of the Impartial Hearing Officer, I reach the same conclusion.

The IDEA defines "free appropriate public education" as "special education and related services" that are provided at public expense and under public supervision, meet state standards and comply with the child's Individualized Education Program. 20 U.S.C. §1401(18). Special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability", including instruction in classrooms and other settings. 20 U.S.C. § 1401(16).

The IDEA provides each child with a disability with a basic floor of educational opportunity. *Board of Education of Hendrick Hudson Central School District v. Rowley, supra*; *Monticello School District No. 25 v. Illinois State Board of Education*, 910 F.Supp. 446 (C.D. Illinois, 1995). A school provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instructions and related services; (2) which are individually designed; (3) to provide educational benefits to the Student. *Rowley, supra.* The school district is not required to maximize educational opportunities or provide the best possible education. *Rowley, supra.* The District has supplied a free appropriate public education when instruction is given with sufficient support services to permit child to benefit educationally. *Sioux Falls School District v. Koupal,* 526 N.W. 2d 248 (S.D. 1994).

The Student progressed during the school year despite the failure of the District to fully and timely implement the May 1997 Individualized Education Program. The

Student met Annual Goal #1, except the part on using conversation starters. The Student was able to self regulate her voice volume, and met Annual Goal #3. The Student was able to use gentle touch and met Annual Goal #4. The Student was not able to meet Annual Goal #2 which was to build certain specific associative thinking skills.

The Student was able to progress in music despite the lack of a regrouping space. The Student went from "developing" the first quarter of the 97-98 school year to "proficient" the second through fourth quarter in music. The Student was also able to progress in her thinking and reading skills during the school year. The Student's abilities were rated as "not yet evident" in "writes and speaks with correct conventions" and "applies thinking skills to reading and writing" at the beginning of the year. By the end of the year her skills in these areas were rated as "developing".

The IDEA does not require that a school be held accountable if a child does not meet the annual goals and objectives. 30 CFR § 300.350. In addition, the appropriate education required by the IDEA is not one that is guaranteed to maximize the child's potential. *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996) The IDEA does require a school and a child's teachers to make a good faith effort to assist the child in achieving the goals and objectives listed in the Individualized Education Program. 30 CFR § 300.350. When efforts early in the school year were reviewed and found not to be adequate, the District took additional action to assist the Student in achieving the goals. The District did make a good faith effort to assist the Student in achieving her Individualized Education Program goals and objectives.

The preponderance of the evidence indicates that the Student benefited educationally during the 1997-1998 school year. The District provided the Student with more than a basic floor of educational opportunity. The District did not deprive the Student of a free appropriate public education.

3. Was the document created after the October 1997 meeting a valid Individualized Education Program?

The District must give proper notice to the parents of the annual review. 34 CFR § 300.345 provides:

> Parent participation. (a) Each public agency shall take steps to ensure that one or both of the parents of the child with a disability are present at each meeting or are afforded the opportunity to participate, including-- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place. (b)(1) The notice under paragraph (a)(1) of this section must indicate the purpose,

time, and location of the meeting and who will be in attendance;

The Student's parents contend that they were not provided proper notice that the meeting in October 1997 was to be an annual review and a new Individualized Education Program would be written. The District contends that the notice was proper and that a valid IEP was written at the October 1997 meeting. In any event, the District did not implement the October 1997 IEP after the parents filed for a due process hearing. The District continued to operate under the May 1997 IEP pursuant to the 'stay put provision of IDEA §1415(e)(3)(A). The Impartial Hearing Officer did not reach this issue.

A note was attached to the notice of the October 1997 annual review given to the Student's mother. The note created an ambiguity as to whether the meeting was to be an annual review to develop another Individualized Education Program for the Student, or was to review progress under the May 1997 Program. The Student's mother reasonably interpreted the note to mean that it was not to be an annual review. The Student's mother did not have the Student's father and any of the Student's private providers at the meeting.

The notice of the meeting with the note attached did not adequately indicate the purpose of the meeting. The parents were denied the opportunity to effectively participate in the annual review. The District did not comply with the requirements of 34 CFR § 300.345. *See Amanda S. v. Webster City Community School District,* 26 IDELR 80, (U.S. D.C., Northern District of Iowa, February 5, 1998). The District did not comply with a procedural requirement of IDEA.

A procedural non-compliance with the IDEA that does not result in any substantial deprivation to the Student is not a violation of the IDEA. *Urban, supra; Chuhran v. Walled Lake Consolidated Schools,* 389 F.Supp. 465 (E.D. Michigan, 1993). The District did not implement the October 1997 IEP and the procedural non-compliance did not result in any substantial deprivation to the student. Therefore the procedural non-compliance was not a violation of the IDEA.

Issues arising under the IDEA are not moot if the parties maintain conflicting interpretations of the law and the issue is capable of repetition, yet evading review. *Honig v. Doe,* 484 U.S. 305 (1988); *DeVires v. Spillane,* 853 F. 2d 264 (4th Cir. 1988). The parties here do have conflicting interpretations on the requirement of notice to the parents of an annual review. The District is required to give proper notice of the annual review to the parents and an annual review will likely be necessary for many years. It will therefore be ordered that the District comply with the notice requirements of 34 CFR §300.345 in regard to future annual reviews.

4. Did the District violate the IDEA by failing to timely provide the parents information after a request?

The District is required to permit parents access to records and to respond to questions. 34 CFR Sec. 300.562 provides:

> Access rights. (a) Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP or any hearing relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child, and in no case more than 45 days after the request has been made. (b) The right to inspect and review education records under this section includes-- (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records;

The Petitioner's contend that his provision was violated by the District. The Impartial Hearing Officer did not reach this issue.

The Student's parents made a written request on December 3, 1997, for documentation concerning the May 1997 Individualized Education Program. Those documents were not provided until February 1998, more than 45 days later. In addition, the Student's mother asked how a goal in the October Individualized Education Program would be measured. There was no response to that reasonable request. The District did not comply with this procedural requirement of the IDEA.

The annual reviews at issue here occurred before the District's failure to respond to the parents. The District continued to operate under the May 1997 IEP. The failure to respond did not affect that IEP. The non-compliance with the access requirement did not result in a substantial depravation of the Student's right to a free appropriate education. *Urban, supra; Chuhran, supra*. Therefore this procedural non-compliance was not a violation of the IDEA.

This procedural non-compliance with the IDEA is capable of repetition. It will therefore be ordered that the District comply with 34 CFR §300.562 should the

Student's parents make any further reasonable request for access to records or make any reasonable inquiry to the District.

Order

1. The Student's request for compulsory education for the District's failure to properly implement the May 1997 Individualized Education Plan is denied.

2. The District did not provide the Student's parents proper notice of the October 1997 annual review as required by the IDEA. The District shall provide the Student's parents proper notice of any further annual reviews.

3. The District did not provide information after requested by the parents as required by the IDEA. The District shall provide the parents information properly requested.

4. This decision of the Administrative Law Judge is the final decision of state level review except that any party may bring a timely civil action in an appropriate federal or state court. State Plan, Part II, A, VII, B, 10; 20 U.S.C. §1415(e).

Dated May 17, 1999

Bruce C Friend

Bruce C. Friend
Administrative Law Judge
Division of Administrative Hearings

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[1] The due process hearing was conducted by Richard G. Fisher. He referred to himself in the Final Order as the 'Impartial Hearing Officer" or as the "Independent Hearing Officer". The regulations for the State Level Review refer to the "Impartial Hearing Officer". State Plan, Part II, VII, 9, b. (1). In this decision I will refer to the hearing officer as the "Impartial Hearing Officer".

[2] Pursuant to the requirements of the State Plan, Part II, VII, 4, e, (3), and Part II, VII, 9, f, this decision is written so that it does not contain the name of the student or parents other than on the first page. The student will be referred to as the "Student", and her parents will be referred to as the "Student's parents", or as her "mother" or "father".

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW was placed in the U.S. Mail, postage prepaid at Denver, Colorado to:

Jennifer A. Rodriguez
State Board of Special Ed.
201 E. Colfax Ave.
Denver, CO 80203

Michael W. Breeskin, Esq.
P.O. Box 4392
Englewood, CO 80155-4392

Richard Lyons, Esq.
P.O. Box 978
Longmont, CO 80502-0978

on this _______ day of May 1999.

____
Secretary to the Administrative Law Judge

ED9817.dur.sb

Case Number: 97:501

Status: Complaint Decision

Key Topics: Procedural Safeguards

Issue:

- Did the BOCS and/or District advise the parents of their right to challenge the decision of the IEP teams.

Decision:

- Documentation shows that the BOCS and/or District advised the parents of their right to challenge the decisions of the IEP teams.

Discussion:

FEDERAL COMPLAINT NUMBER 97.501

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. This complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on February 14, 1997.

B. The complaint was filed by Mr. C.K and Ms. F.K. on behalf of their son, A.R.K. ("R.K.") against the Telluride R-1 School District, Dr. Ann Brady, Superintendent ("the District") and against the Southwest Board of Cooperative Services ("the BOCS").

C. The complaint, originally, was not accepted for investigation based a statute of limitations, as the allegations were relative to procedures that occurred five to ten years previous. The decision not to investigate was remanded by the Office of Special Education Programs ("OSEP") of the U.S. Department of Education. An order was given to investigate such complaint immediately with a decision to be rendered within 30 days of the remand, that is by May 22, 1998.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District and the BOCS as recipients of federal funds under the Act. It is undisputed that the District and BOCS are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

G R.K. was a student with disabilities eligible for services from the District and the BOCS under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCS have violated the provisions of the Act by failing to provide a full explanation of all of the procedural safeguards available to Mr. C.K. and Ms. F.K. each time the BOCS and/or District proposed to (or refused to) initiate or change the identification, evaluation, or the educational placement of R.K. or provide him with a free appropriate public education ("FAPE") beginning 3/14/86 and ending 10/3/94. Specifically did the BOCS and/or the District advise the parents of their right to challenge the decision of the IEP teams during that period.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (19), (20), and 1412 (2)(B), (4), (6) and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.13, 300.14, 300.121, 300.180, 300.237, 300, and 300.534,

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCS were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and the BOCS, in part, based on the assurances contained within its application.

3. Two of the assurances made by the District and the BOCS are that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child and it will provide procedural safeguards to the parents of that student.

4. R.K. was a student with disabilities enrolled into the District in March, 1986, during his first grade year at which time the initial IEP was developed. He continued his enrollment in the District through the end of his sixth grade year in May, 1991. During the summer of 1991, the parents unilaterally placed R.K. into a summer program at a private school in New York called The Gow School. The parents subsequently enrolled R.K. in The Gow School for the school year 1991-92 and he continued there until graduation in May of 1997. Records from the District and BOCS indicate the following:

3/14/86	Parent Consent for Assessment signed by Ms. F.K. Assessment Explained; Procedural Safeguards reviewed as indicated by the signature of G.G., the authorized school official
3/17/86	Psychoeducation Evaluation Conducted by E.F., school psychologist
4/7/86	Initial IEP developed. Participants: adm, reg tchr, psych, s/l, nurse, parents Determination of eligibility: perceptual communicative disorder Services: 30 minutes 3 X week in resource room speech/language 30 minutes per week
3/30/87	Annual Review Participants: PC tchr, reg tchr, psych, prin, parents Committee Recommendations: Continue Present program Progress: at expectation Services: up to 1 hour per day in PC resource speech/language 30 minutes per week
10/20/87	Annual Review Participants: two staff members plus Mr. C.K. Services: 1-2 hours per day in resource speech/language 30 minutes per week counseling 30-60 minutes per week

5/20/88 Review
Participants: Five staff members, parents, child
Progress: Above expectation
Services: 1-2 hours per day in resource
language resource 30 minutes per week
consultive counseling 1 hr. per month

5/15/89 Parent Consent for Triennial Assessment signed by Ms. F.K.
Assessment explained, Procedural Safeguards reviewed by [psychologist]

5/15/89 Triennial review
Participants: psych., spec ed dir, bld. adm, 3 others, parents
Determination of eligibility: PC
Services: 1-2 hours per week of PC Resource
30 minutes per week of speech/language

1/26/90 Review
Participants: Two plus parents
Progress: Above expectation
Services: Resource consult 30 minutes per day

5/7/90 Review
Participants: Five plus parents
Progress: Significantly Above Expectation--social, emotional
At Expectation--Academic
Services: PC Resource 2-3 hours per day
Speech/language 30-60 minutes per week

2/5/91 Parent initiated Review
Participants: Four plus parents
Parental Concern: poor reading level, not being able to read, write and spell; resource room is stressful; 80% content/compensatory skills vs. 20% reading instruction
Response: Team and parents will continue to explore programs and treatment strategies for R.K.'s continued success. We would like to help R.K. begin to discuss how he feels about himself and school.
Progress: At expectation
Services: PC Resource 2 periods per day
Team Teaching 1 period per day
Specialized reading
Discontinue speech/language

9/9/91 Letter from BOCS Special Education Director to Mr. C.K.
"The staffing committee has developed an appropriate placement for [R.K.] that is set forth in [his] Individualized Educational Placement (IEP) and the BOCS is ready, willing and able to provide that placement for him should he return to the Telluride residence area. We encourage your son to attend our schools. However, if it is your decision that he not attend the Telluride School District, please be advised that any costs that you may incur as a result of sending him to school outside of his residence will be your responsibility"

5. The Complainants allege that the District and BOCS did not give to them their rights as parents of a child in special education from the time R.K. was placed until the present (2/3/97). Specifically they allege their rights should have been, but were not given to them at the following times:

4/7/86 Initial placement into special education
2/5/91 Denial of change of placement

Fall, 1991	Change of placement
6th grade	Denial of change of placement
5/20/91	Change of placement
5/16/94	Denial of change of placement

6. On September 16, 1996, the parents requested a special education due process hearing pursuant to the Act and Section 504 of the Rehabilitation Act. The parents sought reimbursement for tuition and related expenses for R.K.'s enrollment in The Gow School from the 1991-92 school year to that current time, in the amount of $105,000. The timeline for that due process hearing was indefinitely extended at the parents' request in order that they locate legal council.

   On May 14, 1997, the District filed a Motion to Dismiss the parents' request for a due process hearing with the Impartial hearing Officer ("IHO") assigned to the case. In its Motion to Dismiss, the District asserted that the parents' request for reimbursement was barred by the applicable statute of limitations and the doctrine of laches. The parents filed a response to the District's Motion, where they asserted, among other defenses, that the statute of limitations must be tolled due to the District's failure to provide them with notice of their procedural due process rights. In granting the District's Motion to Dismiss, the IHO specifically addressed the issue raised in this complaint, and found that the District had properly provided the complainants with notice of their procedural due process rights as required by the Act on numerous occasions. Subsequent to the IHO's dismissal of the parents' request for a due process hearing, the parents appealed the IHO's decision to an administrative law judge ("ALJ"). One of the issues accepted for appellate review was the issue raised in this complaint, that is whether the District had provided the parents with notice of their procedural due process rights. The District appealed the ALJ's decision to the federal district court of Colorado. As a result, the issue raised in this complaint is one of the contested issues to be addressed by the court. At the present time, the parties are awaiting the judge's decision.

7. The law is clear, in that certain procedural safeguards must be complied with in order to fully protect the rights of parents to guarantee their children free appropriate public education. Parents must be provided with written notice of certain procedural rights whenever the educational agency (in this case the District and the BOCS) proposes to (or refuses to) initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education ("FAPE") to the child. Specific requirements regarding the information that must be contained in written notices to parents includes the right to initiate a due process hearing before an impartial hearing officer regarding the child's educational placement.

8. Relative to State Complaint Procedures, the mandate from the Office of Special Education Programs ("OSEP") of the U.S. Department of Education, is also clear. "When the parents of a child with a disability have simultaneously requested a due process hearing and an SEA complaint investigation, the SEA may hold in abeyance the portion of its investigation which is also the subject of the due process hearing, in order to avoid conflicting decisions on the same issues." "When reviewing a complaint, the state educational agency ("SEA") should hold in abeyance issues that are under consideration in a due process hearing and defer to the hearing officer's judgment to avoid conflict." "If an issue has previously been decided in a due process hearing, then the hearing decision should prevail over an SEA complaint investigation of the same issue. Alternatively, the results of an SEA complaint investigation may be presented as evidence in a due process hearing." "A hearing officer's decision should generally prevail over the decision in an SEA complaint investigation on the same specific issues."

D. DISCUSSION

9. The first issue at hand, then, is **whether or not to set aside this complaint because the issue raised in the complaint has been contested at the due process level and appellate level.**

The District's position is that CDE must abstain from investigating this complaint. The issue raised is an issue that has been contested by the parents in their request for due process and one which has been addressed by the IHO and ALJ. Furthermore, this issue will be addressed by the court.

Rendering a decision relative to this complaint could potentially cause a conflicting decision on this issue. However........and a decision, therefore must be based primarily on documentation.

Based on the complainants strong desire to proceed with this investigation, OSEPS' remand, and clear documentation relative to this issue, this complaints investigator will proceed with resolution.

E. ADDITIONAL FINDINGS

10. On 3/14/86, Ms. F.K. provided written parent consent to assessment/evaluation. She signed that she gave her "informed consent" on a BOCS form which listed detailed procedural safeguards on the reverse side. Item 9 states, "Parents are guaranteed the right to an impartial due process hearing, if they disagree with the school district's proposal to initiate or change or refuse to initiate or change the identification, evaluation, educational placement or the provision of a free appropriate public education. This process requires that you made a written request for a hearing." At the bottom of the consent form , Mr. G.G., authorized school official, signed that he defined and fully explained the proposed assessment/evaluation and/or examination(s) and why they are necessary and that he also reviewed the procedural safeguards as stated on the reverse side with the parent and/or guardian.

12. At the 3/30/87 Review, R.K.'s progress was noted to be at expectation and the recommendation was to continue the present program. There is no record of the District's proposing to initiate or change or refusing to initiate or change the placement. Neither the IEP or staffing summary indicate parental opposition.

13. At the 10/20/87 Review, R.K.'s progress was not noted and the recommendation was to increase time in special education. Mr. C.K. attended that meeting which would have served as notice of the change in service and there is no indication on the records of parental opposition.

14. At the 5/20/88 Review, R.K.'s progress was noted to be above expectation and the committee's recommendation was to continue present program. There is no record of the District's proposing to initiate or change or refusing to initiate or change the placement. Neither the IEP or staffing summary indicate parental opposition.

15. On 5/15/89, Ms. F.K. provided written parent consent to assessment/evaluation. She signed that she gave her "informed consent" on a BOCS form. At that time the booklet, "Educational Rights Concerning Your Child and Special Education" was given to her by the school psychologist who signed that she reviewed the procedural safeguards as stated

in the education rights pamphlet with the parent. Item 12 (e) describes the right to appeal decisions.

16. At the 5/15/89 Review, progress was noted to be significantly above expectation in the social/emotional areas and at expectation in academics. The recommendation was to increase time in special education. Both Mr. C.K. and Ms. F.K. attended that meeting which would have served as notice of the change in amount of service and there is no indication on the records of parental opposition.

17. The 2/5/91 Review was at parents' request due to concerns about reading and stress and the nature of programming. There is no indication of the parents' requesting a change in placement, however; nor of the District's refusal.

18. At the 5/20/91 Review, progress was noted to be at expectation and the committee's recommendation was to continue present program. There is no record of the District's proposing to initiate or change or refusing to initiate or change the placement. Neither the IEP or staffing summary indicate parental opposition.

19. An affidavit of Sandy McLaughlin, states that during the 1990-91 school year she was the special education teacher who hosted several staffings for R.K., and that at each one she gave the parents a copy of the BOCS booklet entitled, "Educational Rights Concerning Your Child and Special Education" revised 5/87.

20. An onsite visitation conducted by CDE at the BOCS on May 10-12, 1994, at which time records of procedural safeguards for the previous 5 years were reviewed, found the BOCS to be in full compliance. An onsite checklist indicated that the BOCS did provide acceptable procedural safeguards, including a full explanation of all procedural safeguards, a description of the action proposed or refused and an explanation and description of options.

21. No documentation was provided of the parents' informing the District of their concern, prior to 9/16/96. No documentation suggests they believed the District was failing to provide an appropriate program. No documentation suggests that they believed the IEP created and instituted by the District did not meet R.K.'s needs.

22. The 5/16/94 letter from Mr. C.K. to the District's Superintendent was a "money request for retro and prospective tuition assistance." and was not a request for a change of placement.

23. In an affidavit of Ms. F.K., she states the following:

> The officials did hand me a paper to sign that would allow for further evaluations of my son for the purpose of special education. It is possible that the paper I signed had printed on the back of it a list of rights as parents, but I have no present knowledge of this.
>
> The only explanation I was given at the time of signing was that the school officials needed my parental signature in order to do further evaluations. There was never any mention, discussion nor any explanation of any parental rights.
>
> I have never been given a copy of my legal rights nor have I ever been given any explanation of my legal rights regarding the education of my son who was in special education by any school official at any time.

> The first time that I was made aware that I had such possible rights as a parent was in 1994 after learning about the same from a report on television.

24. In an affidavit of Mr. C.K., he states the following:

> I have never received nor was I ever advised of my due plrocess rights as a plarent of a child in splecial education in any form at anytime by anyone from the Telluride School from 1986 to the present.
>
> During R.K.'s splecial education school years, grades 1 through 6, I made objections to R.K.'s IEPs, but, unaware that I had any avenues other than requesting the IEP committee to make changes, I did not pursue a formal appeal. I did, however, call two IEPs to review and to discuss my dissatisfaction. On one, my objection to the then current 80% compensatory 20% remedial program is noted, but the school refused to make any changes.
>
> When I enrolled R.K. in The Gow School, this enrollment constituted a change of placement and I was not advised of my due process rights.
>
> My response letter to Larry Maxey dated 11/31/91 stated my dissatisfaction with the District because it had not met my son's special needs. Maxey did not at this time nor any other time advise me of my due process rights.
>
> The May 16, 1994 letter to the Superintendent was also a request for a change of placement and resulted in the denied change of placement letter dated 10/3/94 from the school's attorney. The attorney denied my request for change of placement, but did not inform me of my due process rights.

F. ADDITIONAL DISCUSSION

25. It is obvious that the District's/BOC's and the complainant's perceptions of whether or not procedural safeguards were afforded to the complainants are quite disparate. The process of complaint resolution, however, does not allow for taking testimony under oath for determining credibility. For that reason, this complaints investigator must rely on documentation found in the official school record of R.K., in BOCS records and in CDE records. Although it is often the practice in complaint resolution to interview witnesses to assist in understanding a disparity, it would be impossible to do so relative to 5 - 10 years ago.

26. It is acknowledged that the complainants submitted sworn statements in which they claim procedural notices were not given to them between 1986 and May, 1991. However, they have submitted no documents created in those years to substantiate their claims. There are also no documents on file which would indicate that the complainants disagreed with the decisions of the IEP teams, of which they were apart. In fact, on one occasion an IEP team was called to meet to discuss some concerns that Mr. C.K. had. There is no information to suggest the parents disagreed with the outcome of that meeting.

27. When Ms. F.K. acknowledged by her signing that she did give informed consent, a presumption exists that she was, in fact, informed of the procedural safeguards on the reverse side of the form and/or in the booklet given to her.

28. In her affidavit, Ms. F.K. stated that it is possible that the paper I signed had printed on the back of it a list of rights as parents, but I have no present knowledge of this. It

would seem that if these parents were so opposed to the services provided, they would have made it a point to go back and read the booklet or back of forms provided to them.

29. This money requested in the 5/16/94 letter from Mr. C.K. to the District's Superintendent was a "money request for retro and prospective tuition assistance." and was not a request for a change of placement and cannot be construed as a refusal to change the educational placement. R.K. was withdrawn from the District 3 years prior to this letter and at the time of his withdrawal, the district provided written assurance of its willingness and ability to provide a FAPE to R.K. should he re-enroll.

30. The issue, then, is whether to acknowledge the documentation within the records of the District and BOCS along with some general documentation at CDE, or to believe that the memories of the parents are far more exact that the documentation. The complaint process is one that relies heavily on documentation and the decision in this complaint will reflect that process.

III. CONCLUSIONS

The District and the BOCS have not violated the provisions of the Act by failing to provide a full explanation of all of the procedural safeguards available to Mr. C.K. and Ms. F.K. each time the BOCS and/or District proposed to (or refused to) initiate or change the identification, evaluation, or the educational placement of R.K. or provide him with a free appropriate public education ("FAPE") beginning 3/14/86 and ending 10/3/94. Specifically, there is documentation that the BOCS and/or the District advised the parents of their right to challenge the decisions of the IEP teams during that period.

IV. REMEDIAL ACTION

None.

Dated this 18th day of May, 1998

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 502

Status: Complaint Decision

Key Topics: FAPE
IEP
Related Services

Issues:

- Provision of services, including counseling, S/L, modifications

Decision:

- District, by its own admission did not provide 10 hours of s/l services and has agreed to provide compensatory services.

Discussion:

- Special education and related services, not clearly written on IEP

FEDERAL COMPLAINT NUMBER 97.502

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 2, 1997.

B. The complaint was filed by Ms. T.F. on behalf of her foster child, K.M., against the Clear Creek School District, Dr. Joanne Ihrig, Superintendent, and Ms. Jane Snyder, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter was to have expired May 2, 1997, but was extended to May 16, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G K.M. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to provide a free appropriate public education ("FAPE") to K.M. by not providing the following services from 9/3/96 to the present, as listed on the individual educational plan ("IEP") dated 8/14/96:

- eighteen types of modifications of K.M.'s regular education program,
- counseling 15 minutes per week,
- speech/language services 30 minutes per week and
- "drop in" special education instructional services 500 minutes (8 hours, 20 minutes) per week

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. K.M. was identified as a student with disabilities on an IEP dated 8/16/96. The primary disabling condition was significant identifiable emotional disorder ("SIED") with perceptual communicative ("PC") and speech/language ("S/L") disorders listed as other disabling conditions.

5. K.M.'s 8/16/96 IEP indicated that he was to spend no time in regular education without special education support. Special education services to be provided were: 15 minutes of consultation, 15 minutes of counseling, 500 minutes of special education, 30 minutes of speech/language and 500 minutes of "drop-in" special education service per week. In addition he was to receive 12,500 minutes of regular education per week. Modifications to regular education were to have included the following:
extra time to complete/hand in assignment
long range projects given in short segments
shortened length of assignments
additional resource room support for academic or behavior issues
minimized memory demands
vocabulary lists prior to lessons
  words and phrases that have hidden meanings such as idioms explained
extra time on tests
  allowing more generalized answers
  requiring student to repeat questions/directions before answering
tests read to student
directions/instructions given orally and in writing
  oral directions rephrased, repeated and broken down
modified reading assignments
taped reading materials
repetition of explanations/practice
ability to take tests in resource room

6. The complainant alleges the following:

    a. K.M. doe not receive 15 minutes a week of counseling,

    b. K.M. does not receive 30 minutes of speech/language,

    c. K.M. does not receive 500 minutes of "drop in" special education services

    d. None of the modifications are being made in the regular education classes.

7. The District, in its response to the complaint, indicates the following:

    a. Informal counseling was provided by a school counselor to monitor K.M.'s progress and to provide additional information to the Social Services counselor working with K.M. K.M. was also involved in the 8th grade new student group in the fall. This type of counseling, according to the District, was different from the counseling K.M. receives from Social Services and this was not understood by the complainant.

    b. The District admits that it did not provide K.M. with the 30 minutes per week of speech/language services required in his IEP until 2/12/97, when this was brought to the District's attention. The District has agreed to provide 10 hours of speech/language services to K.M. to compensate for this time missed and T.M. has agreed to this compensatory action.

    c. "Drop In" services means a student can leave the regular classroom to receive additional support in the resource room, should he or the regular teacher so choose. Although these services were available, K.M. and the regular teachers only used them occasionally. The District alleges that T.F. misinterpreted "drop in" to mean assistance provided in the regular class. At the 3/12/97 IEP meeting, "drop in" services were explained to T.M. and she supported this "drop in" plan. According the District, K.M. and his teachers prefer to have him remain in the regular classroom and get the additional support during the study skills class when possible. The regular teachers noted that K.M. does well in the regular class and only on rare occasions has he needed to utilize the "drop in" services.

    d. The modifications checked are those that might benefit the student, but that professional judgment has been used in the past regarding the modifications needed for a particular assignment or activity. Regular education teachers indicated that modifications were made regularly for K.M. with input from the special education staff and lists of those were provided to this office as follows:
        Science - 7
        Leadership - 10
        Exploratory Language - 6
        Physical Education - 3
        Health - 9
        Art - 4
        American History - 10

    e. The breakdown, according to the District, appears to be in the understanding of what is to be done and in communication between home and school. The District, in an attempt to resolve this situation held a review IEP meeting on 3/12/97. At that time a more precise plan for modifications was addressed along with a plan for communication with T.F.

8. The law is clear in that special education and related services listed on IEPs must be provided to students with disabilities. In addition, if modifications to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described and must be made. This applies to any regular education program in which the student may participate, including physical education, art, music and vocational education. The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. Counseling services, according to the Act, means "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel".

   The IEP for K.M. is not clear. On the one hand it states that K.M. is to spend no time in regular education without special education support and on the other, it lists 12,500 minutes (208 hours or 30+ days per week ??) of regular education per week plus 500 minutes (8+ hours) of "drop in" special education services. The IEP did not define informal counseling, nor did it define "drop in" special education services. The District and the complainant/foster parent did not have a common understanding of the District's commitment of resources.

9. The District, in its response to this complaint, has acknowledged that the concerns brought forth in this complaint have provided it with opportunities to learn and improve. Some of the areas the District is addressing as a result are:

   a. providing, clearly communicating, and documenting appropriate adaptations to be used in the regular classrooms,
   b. developing checks and balances to assure that related service providers are notified of students returning to the District, and
   c. documenting on the IEPs more clearly, the services to be delivered.

10. The complainant, in a telephone conversation, has indicated that many of these issues have been resolved and that she is in agreement with the IEP developed on 3/12/97. She is concerned, however that the taped reading materials as listed on that IEP have not yet been provided and that regular education teachers may not yet understand their responsibility to provide modifications to students with disabilities.

III. CONCLUSIONS

While the District did not clearly violate the provisions of the Act by not providing counseling, "drop in" special education services, and modifications to regular education; it was definately not clear to the complainant, nor was it clear from the IEP, what specific services and modifications were to be provided under what circumstances.

The District, by its own admission, did violate the provisions of the Act by not providing approximately 10 hours of speech/language services as listed on the IEP and has agreed to provide 10 hours of compensatory services.

The District has clearly improved the quality of the IEP written on 3/12/97, to include specific services and modifications to be provided; and the District has improved it's communication relative to these issues.

IV. REMEDIAL ACTIONS

The District must provide documentation to this office that the following were provided:

- 10 hours of additional speech/language services to compensate for those not provided
  and
- taped text books for Science and American History, as listed in the 3/12/97 IEP.

Dated this 16th day of May, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 503

Status: Complaint Decision

Key Topics: FAPE

Issues:
- provision of FAPE to all students, including s/l, OT, psychological services and assistive technology service

Decision:
- no violation

Discussion:

FEDERAL COMPLAINT NUMBER 97.503

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. Two identical complaints were received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 11, 1997.

B. The complaints were filed by Ms. P.L. on behalf of her child, R.N. and by Ms. M.D. on behalf of her child, A.D. and on behalf of all students with disabilities within the Clear Creek Schools, against the Clear Creek School District, Dr. Joanne Ihrig, Superintendent, and Ms. Jane Snyder, Director of Special Education ("the District"). These two complaints were identical relative to format, type and allegations; this complaints investigator was aware that the complainants had communicated with one another relative to the filing of these complaints; so therefore, the two complaints were combined and treated as one.

C. The timeline within which to investigate and resolve this matter was to have expired May 12, 1997, but was extended to June 9, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide a free appropriate public education ("FAPE") to R.N., A.D. and all students with disabilities by not providing the services listed on their individual educational plans ("IEP"s), specifically speech/language services, occupational therapy, psychological services and assistive technology services.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. The complainants allege the following:

   We as parents of students that are currently enrolled or that have been withdrawn from the district...have witnessed failures to implement our children's Individualized Education Programs ("IEPs"). We feel they have failed to meet state standards and approximate the grade levels used in regular education. We feel they have failed to provide services such as speech/language therapy, occupational therapy, psychological therapy as stated in their IEPs. We feel they have failed to provide assisted technology services as states in IEPs. On behalf of our children, R.N. who was withdrawn from the district on 10/21/96 and A.D. who was withdrawn from the district on 1/8/97, who deserve an education within the school district we reside in, we respectfully request that you investigate this matter and order whatever compliance actions are deemed necessary to correct these violations.

   No copies of IEPs, listing of services alleged not to have been provided, nor other supporting documentation were provided other than the information as stated above.

5. The District responded to the complaints, providing IEPs and other information regarding R.N. and A.D., as well as a list of the persons having provided special education and related services to these students. The District also enclosed a list of all special education services providers within the District as well as a list of all students with disabilities.

6. Regarding R.N.:

   a. R.N. was a student with perceptual communicative disabilities as indicated on an IEP dated 12/5/94, resulting from an triennial review. Current levels of functioning, needs, goals and short term objectives were developed as part of that IEP. The Service Plan included 10 minutes per week of special education consultation to regular educators, 500 minutes per week of special education and 100 minutes per week of drop-in special education services. In addition, 17 modifications of R.N.'s educational program were listed. Ms. P.L. was in attendance at that meeting and provided written consent for service. No speech/language therapy, occupational therapy, psychological therapy or assistive technology services were listed on the IEP.

b. School records indicate meetings occurred on 10/20/95 and 11/16/95 relative to R.N.'s refusal to attend school. Alternatives were discussed and plans were designed to address the attendance problem. There is no mention of failure to provide appropriate services.

c. An IEP review was held on 12/4/95. Goals and objectives were reviewed and rewritten and R.N.'s minimal progress was discussed as well as his poor attendance. It was noted that he was failing most classes due poor attendance, even though curricular modifications were provided. Services were changed to 15 minutes of special education consultation to regular educators per week and 450 minutes of special education. Six modifications of the educational program were listed.

d. Additional meetings were held on 2/16/96 and 3/26/96 to discuss R.N.'s refusing to come to school. Alternatives tried were shortened school days, community internships and counseling, which were deemed ineffective. Records indicate that R.N. was absent 39 days during the 1995-96 school year. Due to his poor attendance he did not receive any credits.

e. A meeting was held on 10/1/96 to discuss R.N.'s absence from school for almost two weeks. Ms. P.L. was informed of the need for R.N. to attend school and that a failure to do so would result in Social Services' notification of the county attorney. Ms. P.L. stated she was considering the alternative of home schooling.

f. On 10/26/96, R.N. was withdrawn from school to be home schooled by Ms. P.L., the primary reason (according to records) being his refusal to attend school.

g. Although R.N. was not enrolled in the District, two IEP review meetings were scheduled to address Ms. P.L.'s concerns and to offer services to R.N. should he choose to attend school. Records indicate one meeting was scheduled for 2:00 p.m. on 3/13/97; however Ms. P.L. called at 8:30 on that day to cancel that meeting. The meeting was rescheduled for 3/27/97 at 2:00 p.m., however Ms. P.L. called at 1:00 that day to cancel that meeting.

7. Regarding A.D.:

a. A.D. was identified as a student with perceptual communicative disabilities on an IEP dated 1/13/94, although it appears the IEP was not completed until 2/4/94. Current levels of functioning, needs, goals and objectives were developed as part of that IEP. The Service Plan included 30 minutes per week of special education consultation to regular educators, 275 minutes of special education and 30 minutes of occupational therapy. In addition, 16 modifications of A.D.'s educational program were listed. Ms. M.D. and her husband were in attendance at that meeting and provided written consent for service. No speech/language therapy, psychological therapy or assistive technology services were listed on the IEP.

b. On 4/13/94, Ms. M.D. requested the suspension of special education services for A.D. "due to excessive discussion with the school, concerning behavior and poor achievement this quarter, consultation with this O.T. therapist and his pediatrician and A.'s desire to work independently". There was no mention of the failure to provide appropriate services. The school complied with the request for cessation of special education services for the remainder of the school year.

c. Special education services resumed in the fall of 1994, and an annual review was held on 2/3/95, with M.D. in attendance. The IEP review states that all O.T. goals were met. Services listed were 300 minutes of special education per week and 30 minutes of OT per week. 15 modifications of the educational program were listed.

d. A.D. was withdrawn during the second semester of 1996 to be home schooled.

e. A.D. returned to the District in the fall of 1996, but had extensive absences that affected his classroom performance (approximately 25 days during the fall semester). The current resource teacher and elementary resource teacher reported several attempts to make phone contacts with M.D. to discuss special education services, but that the parents were reluctant to receive services. The school principal and the resource teacher also recalled that special education services were not welcomed.

f. A.D. was withdrawn again on 1/8/97 to be home schooled. M.D. gave the following reasons for withdrawal in a letter dated 1/8/97: "As a parent, my growing concern for the following has determined this action: development of a positive self image, instruction in age appropriate materials that allows for absorption of the subject matter, lack of teacher support, that should insure that students have understanding prior to moving on to alternate materials and what I've perceived to be an attitude of indifference for students who are challenged within the regular classroom. I've heard from members of the middle school staff that they have an enormous amount of students to track and that they just do not have the time to spend with each and every student who has a problem....Concerning my own child who has asked for additional help, and been overlooked, has developed an attitude that he has to learn on his own. This attitude does not reflect a positive image toward student or the teachers. Teachers should be aware through a student's attendance, quality of assignments, quiz scores, participation in class groups or discussion, that additional time may be needed..."

g. On 2/6/97, Ms. M.D. brought her concerns about the District to the superintendent and director of special education. The special education director arranged-for-updated testing (as a triennial was due 1/13/97, if enrolled) and an IEP review was scheduled.

8. Regarding other students with disabilities:

a. A list of 233 student with disabilities within the District was reviewed. 48 of those students were receiving speech/language services as a related services and 2 were receiving occupational therapy as a related service. The District employs two speech/languages service providers (one of whom coordinates SWAAC [relating to assistive, alternative, augmentative communication needs]), one OT, one PT and two psychologists.

b. The District, in its response to the complaint states that the allegation on behalf of all students in the District is unwarranted. The District alleges that it does provide appropriate services to students with disabilities as outlined in the Act and that it has sufficient, qualified, and dedicated staff to deliver services deemed necessary by the IEP teams.

c. Another complaint was previously filed against the district by a parent who was in communication with M.D. and P.L. The findings in that complaint include the following which are relevant to this complaint:

  - The District admitted that it did not provide the student with 30 minutes per week of speech language services required in his IEP, for approximately 20 weeks; and the District agreed to compensate for this time missed. The reason given was that the student had withdrawn from the District, then re-enrolled; and the District failed to "catch" this need for a related service.

  - The IEP for that student was not clear as to the specific services and modifications that were to be provided under what circumstances. The District and the complainant did not have a common understanding of the District's commitment of resources.

  - The District, in it response to that complaint, acknowledged that the concerns brought forth in the complaint provided opportunities to learn and implove. Some of the areas the District is addressing as a result are:

    • providing, clearly communicating, and documenting appropriate adaptations to be used in the regular classrooms,

    • developing checks and balances to assure that related services providers are notified of students returning to the District, and

    • documenting on the IEPs more clearly, the services to be delivered.

9. An onsite visitation of the District was conducted by the CDE Special Education Services Unit on April 25-26, 1995. This complaints investigator reviewed that report in an effort to understand what might be the issue here. At that time, the District was not found to be out of compliance relative to any regulations. Some concerns were addressed which have relevancy to this complaint. They are as follows:

   a. During the on-site visit 20% of the parents of students with disabilities were contacted. Parents indicated that there is a strong commitment by the district to students in special education and to maintaining good relationships with parents. Parents in general felt knowledgeable about the special education process....for the most part, parents feel that the IEP is working for their students, however, parents of students at the high school level expressed the greatest concerns. Parents would like more emphasis on life skills. Parents are satisfied with the implementation of the IEP. Parents indicated that they would like more support and training for staff around ADD issues and curriculum modifications. There was mixed information regarding efforts to help students. Several parents indicated concern that special education staff was reluctant to modify curriculum for students or to work in the regular classroom. On the other hand, parents mentioned teachers who went out of their way for students including summer tutoring on the teachers' own time.

   b. The onsite team expressed concern that the district lacks adequate instructional support to meet the affective needs of students.

c. The onsite team expressed concern that some regular education teachers do not always make the necessary modifications and accommodations required by the student's IEPs.

d. The team felt there was a need to improve services to students with social-emotional needs.

e. The onsite team noted that the special education staff are dedicated, enthusiastic and creative. They have a commitment to quality and work very hard to establish partnerships with parents, collaboration with regular education staff and effective working relationships with their students.

10. The law is clear in that special education and related services listed on IEPs must be provided to students with disabilities. Should speech/language therapy, occupational therapy, psychological therapy or assistive technology by listed as a service on an IEP, it must be provided.

    a. R.N.'s IEP listed none of these services, however.

    b. A.D.'s IEP listed only one of these services, occupational therapy. However, during an IEP review the following year, it was reported that all O.T. goals were met. There was also mention of Ms. M.D.'s consultation with the occupational therapist.

    c. School records indicate many meetings were held regarding R.N.'s failure to attend school and there was no mention of failure to provide appropriate services.

    d. When A.D.'s mother met with school officials to request cessation of special education services, there was no mention of failure to provide appropriate services.

    e. Upon withdrawal of A.D. on 1/8/97, Ms. M.D. did indicate her concern about instruction in age appropriate materials, lack of teacher support, an attitude of indifference for students who are challenged and high case loads for special education teachers.

11. While Ms. M.D. and Ms. P.L. allege failure to provide speech/language therapy, occupational therapy, psychological therapy or assistive technology throughout the District, this complaints investigator is not able to find any indications of this, except in the case of one student who, upon re-enrollment into the district, erroneously was not placed on the speech/language therapist's roster. The District has admitted its error in this situation and is providing compensatory services.

    During a telephone conversation with the M.D. as part of the investigation of this complaint, this complaints investigator indicated her surprise at not finding these services listed on R.N.'s or A.D.'s IEPs. M.D. stated that although she was aware they were not listed for these two students, she knew of many parents whose children did not receive these services as listed on their IEPs. M.D. agreed to have these parents contact the complaints investigator, or to give the complaints investigator the names of these students, so that a review of their IEPs could be made and an investigation into the allegation of non-provision of services could be made. This complaints investigator has received neither, as of 6/9/97.

    A report from 20% of the parents of students with disabilities within the District, interviewed during an onsite visitation conducted in April, 1995, indicates parents believe there is a strong commitment by the district to students in special education and to maintaining good relationships with parents, that the IEPs are working for their students and that they're satisfied with the implementation of the IEPs. They did express some concern about reluctance to modify curriculum for students.

12. Clearly, the complainants feel quite strongly that the District fails to implement the IEPs of students with disabilities. The District, just as strongly believes it provides appropriate services to students with disabilities and that it has sufficient, qualified, and dedicated staff who deliver those services listed on IEPs. A review of numbers of students and related service personnel appear to indicate an average student-therapist ratio. A sampling of other parents within the District indicates their belief that IEPs for their students are working and they're satisfied with the implementation of those IEPs.

13. Both R.N. and A.D. have had extensive absences while enrolled in the District and both have been withdrawn by their parents to be home schooled. While this complaints investigator is concerned relative to these students not wanting to be in school within the District, she can find no evidence of the District's failure to provide a free appropriate public education to them. In fact, the District is trying to reevaluate these students and develop IEPs to meet their current needs. There is also no evidence to suggest the District's failure to provide services to other students with disabilities within the District.

III. CONCLUSIONS

The Clear Creek School District has not violated the provisions of the Act, by failing to provide a free appropriate public education ("FAPE") to R.N., A.D. and all students with disabilities by not providing the services listed on their individual educational plans ("IEP"s), specifically speech/language services, occupational therapy, psychological services and assistive technology services.

IV. REMEDIAL ACTIONS

None.

V. RECOMMENDATIONS

As these students are 14 and 16 years of age, it is a critical time to do transition planning for them and to offer to them those transition services which will allow them to enter productively and confidently into the adult world. It is highly recommended that the District offer transition planning and services and that the families participate in this evaluation and planning process. There are many ways in which services can be offered different from the ways in which services have been delivered in the past, to which the students or families have objected or rejected. Should the families or the District so choose, CDE can provide assistance with that transition planning and/or assistance with communication through mediation.

Dated this 9th day of June, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 504

Status: Complaint Decision

Key Topics: FAPE
transition plan

Issues:
- development of transition plan as part of IEP
- provision of paraprofessional support

Decision:
- no violations

Discussion:

FEDERAL COMPLAINT NUMBER 97.504

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. Two complaints were received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 18, 1997.

B. The complaints were filed by Ms. J.L. on behalf of her son, J.L., against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent, and Dr. Joe Hendrickson, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this was to have expired on May 19,1997, but was extended to June 2,1997.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaints were brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaints were accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaints pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. J.L. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaints included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to develop a transition plan, as part of the individual educational planning process and failing to provide the services of a paraprofessional 30 hours per week, beginning 2/26/97, as stated on the individualized educational program ("IEP") dated 10/23/96.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, 300.347, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.L. is a student with multiple disabilities including cognitive impairment, hearing disability, physical disability and speech/language disability as indicated on an Individualized Educational Program ("IEP") dated 10/23/96, which is 30 pages in length. This IEP was completed on 2/26/97, having had additional meetings on 1/22/97 and 2/5/97, each of which lasted three + hours. The reasons for the subsequent meetings to complete the IEP were documented in a contact record kept on J.L. The record indicates that on 10/23/96, the complainant and her advocate did not want to complete the IEP that day, as they requested additional communication assessment from the Colorado School for the Deaf and the Blind ("CSDB"). Ms. J.L. was contacted numerous times about setting a date to complete the IEP.

   J.L.'s birthdate is 5/21/80, thus he was sixteen years of age at the time this IEP was begun. Services listed on the IEP were as follows and were to be provided from 10/23/96 to 2/26/98:

   - special education instruction 28 hours per week in the ASP program,
   - O.T. direct services in the ASP program .5 hours per week,
   - Speech/Language direct services .5 hours per week and
   - services of a paraprofessional in the ASP program 30 hours per week. The para-professional working with J.L. is to know basic conversational sign language.

5. Ms. J.L. alleges in her complaints that a paraprofessional has never been hired as indicated on J.L.'s IEP, and that a transition plan had not yet been developed on February 26, 1997. Ms. J.L., in a letter to this complaints investigator, dated 4/29/97, also alleges that J.L. was not allowed to go on a field trip with his Science Exploration class, as a retaliation for her having filed the complaint.

   Ms. J.L. also filed a discrimination complaint with the U.S. Department of Education which was received on December 6, 1996 (case number 08971041B). This complaint alleges that the District discriminates against her son on the basis of his hearing disability by not providing him an appropriate education. Ms. J.L. states in this complaint that "J.L. has never had access to his education because of lack of communication."

In a letter to this complaints investigator, dated 5/22/97, Ms. J.L. alleges that her son's hearing impairment has been ignored by the school district since 1990-91, that the IEP is still not being implemented causing J.L.'s education not to happen 100% of the day.

6. The law is clear as to the obligations of the District relative to providing those services listed on the IEP and relative to the development of a transition plan.

   Since the IEP states " services of a paraprofessional 30 hours per week" will be provided, those services must be provided by the District.

   Transition services means a coordinated set of activities for a student, designed within an outcome-oriented process, that promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment, continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities must be based on the individual student's needs, taking into account the student's preferences and interests, and include needed activities in the areas of instruction, community experiences, development of employment and other post-school adult living objectives and, if appropriate, acquisition of daily living skills and functional vocational evaluation.

   The transition plan, then would include functional vocational evaluation, transition goals and objectives as well as specific transition services.

7. A review of J.L.'s IEP indicates the following regarding transition planning:

   Documentation of Assessment Data and Present Level of Functioning:

   "Coach-for School Progress" was administered to J.L..

   "Transitional planning should be updated annually to assist with identifying needed supports in the areas of communicative skills as they relate to activities of daily living, social/community activities, vocational placement and skill development; J. will also need support for vocational, residential, self-care, financial, legal, medical, transportation and social endeavors for an undefined time throughout post-secondary activities."
   "J. will unlikely acquire a drivers license and will need assistance to ride public transportation or connections to other resources outside of parents."
   "J. will need assistance to manage medical needs, appointments, etc."
   "J. will require assistance to maintain financial resources such as SSI/medicaid and also to manage personal budgets."
   "J. may need a guardian to assist with managing finances and decisions affecting his daily life as well as major life decisions."
   "J. may need support to continue developing competitive entry level hard and soft vocational skills or with supported work programs."
   "J. may need continued support to maintain friendships and have opportunities to interact with and meet others, as well as access local recreational opportunities."
   "J. will need support to access community events, retail outlets and markets, etc. both in his neighborhood and the community in general."
   "well connected to agency service providers"

"involved parental support"

Desired Outcomes:

Academic/Vocational:

"J. will be able to use basic academic concepts and skills, such as recognizing name, reading basic building diagrams and one to one correspondence in work settings."

Vocational:

"Develop skills that more closely approach entry level requirements for paid rather than supported employment."

Residential/Domestic:

"J. will acquire personal care skills for hygiene and maintaining personal space."

Community"

"J will develop ability to access community services, shops and recreational options with more minimal supports."

Vocational, Community, Recreational, Transportation/Mobility, Residential:

"J. will be able to physically participate in activities in all of the above mentioned contexts and activities within those contexts."

Goals and Objectives:

Goals and several objectives were written under each area of desired outcomes.

8. A review of the Contact Record indicates the following regarding transition planning:

   9/4/96 telephone conversation ("TC") with mom regarding job placement...
   9/10/96 visited job site, reviewed progress with job coach and work supervisor....
   9/11/96 tc to parent, reviewed my visit to job site....
   9/23/96 met with parent to further discuss her hopes and dreams for J's transition plan....
   1/15/97 letter from parent responding to may letter...She stated all agenda items seemed appropriate except for reviewing J.'s basic autobiography and future hopes and dreams......
   1/21/97 talked to J.'s job coach regarding ....

9. A letter from the District to the student, J.A.L., dated 1/8/97 formally invites him to attend the IEP meeting on 1/22/97 during which time transitional goals and objectives to assist him with his eventual movement to post-secondary school activities will be discussed. The letter also indicates that his teacher personally would invite him to attend.

10. Notes from the 1/22/97 Meeting list Best Hopes, Current Functioning and Concern Areas and Needs developed with the mother/complainant and her advocate at the IEP meeting, for the express purpose of transition planning.

11. According to records, J.L. was placed both in the Adaptive Skills Program at Rocky Mountain High School and into the moderate needs program, as well as into a work-study program at a local hospital three afternoons a week. Interviews with District staff indicate that J.L. always had a full time aid or paraprofessional with him, and that this has occurred since the beginning of the school year.

12. A letter from the District to the complainant, dated 3/26/97, indicates that three paraprofessionals are working with J.L. and that each had completed a basic sign language

class. Each is familiar with J.'s sign language word list and use one, two and three word combinations of signs when communicating with J.L.

13. A report of a psychological evaluation, done by a psychologist from CSDB at the request of the mother/complainant and the school, indicates the following regarding some disagreement between the complainant and the District:

> "Mrs. L. expresses strong feelings that continued teaching of sign language and further immersion in sign language rich environments will best meet J.'s needs. This examiner has strong concerns related to this approach and disagrees with Mrs. L."
>
> "If continued issues surface between Mrs. L. and the RMHS staff who work with J., utilization of an educational mediator may prove beneficial in helping to reduce conflict."
>
> "While Mrs. L. clearly loves J. and assists J. with the best of intentions, this examiner is concerned with how much reliance and dependence J. places on her. Mrs. L. may want to pursue some independent evaluation of things she can be doing within the home setting that promotes J's independence and initiation."

14. Interviews with District staff indicate that the reason J.L. was not able to go on a field trip with his Science Exploration Class. J.L. attends the Science class two days per week. The field trip was occurred on a day other than that which he attends; and it occurred in the afternoon during the period of time in which J.L. is on the job at the hospital. He was not in school, nor in the Science class when this field trip occurred. Staff emphatically state that this had nothing to do with retaliation for Ms. J.L.'s filing this complaint.

15. The U.S. Department of Education's response to the complaint filed with them is as follows:

> "In response to OCR's request for data, the District provided OCR with a copy of the child's latest Individualized Education Program dated February 26, 1997, which resulted from meetings on October 23, 1996, January 22, 1997, and February 5 and 26, 1997. Our review of the documentation provided indicates that the District has met all of the procedural requirements of Section 504 and also addresses the complainant's specific allegations with regard to receptive and expressive communications skills and delivery of services for her son. The complainant's signature on the IEP acknowledges her presence and participation in the development of her son's IEP. This concludes OCR's consideration of this case. Therefore, we are administratively closing this case effective the date of this letter."

16. It is obvious that the District's and the complainant's perceptions of what type of planning and services have taken place, are quite disparate. The process of complaint resolution, however, does allow for taking testimony under oath for determining credibility. A review of the records, however, clearly indicates transition planning did occur and that J.L. has the services of a paraprofessional.

III. CONCLUSIONS

The District did not violate the provisions of the Act by failing to develop a transition plan as part of the individual educational planning process. Records clearly show all elements of transition planning were incorporated into the IEP.

The District did not violate the provisions of the Act by failing to provide the services of a paraprofessional 30 hours per week, beginning 2/26/97, as stated on the individualized educational program ("IEP") dated 10/23/96. J.L. has had a full time aid (paraprofessional) during the entire school year.

Interviews with District staff and record reviews indicate, rather, that the District has spent significantly more hours planning for J.L. than would be the average for all other students with disabilities. Planning has been thorough and has included all aspects of transition. This complaints investigator was impressed with the amount of knowledge staff had about J.L., the extent to which coordinated services are being provided and the commitment of the staff. This complaints investigator is also appreciative of the cooperation from District special education administrators who provided volumes of material for review.

Dated this 30th day of May, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 505

Status: Complaint Decision

Key Topics: Evaluations
Eligibility Criteria
Procedural Safeguards

Issues:
- Evaluating to determine eligibility
- Procedural safeguards when refusing to evaluate

Decision:
- No violations

Discussion:

FEDERAL COMPLAINT NUMBER 97.505

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 27, 1997.

B. The complaint was filed by Mr. R.L.K. on behalf of his son, J.C.K, against Adams County School District 12, Dr. Judy Margrath-Huge, Superintendent, and Dr. Allan Cohen, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this matter expires May 26, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to evaluate J.C.K. to determine eligibility for special education or failing to provide his parents with written notice of their procedural safeguards when refusing to initiate the evaluations requested by them:

-in the fall of 1995,
-at the time of the first parent teacher conference at Skyview Elementary that school year,
-later during the 1995-96 school year, and
-at the beginning of the 1996-97 school year.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.121, 300.130, 300.180, 300.220, 300.235, 300.300, 300.504, 300.531, 300.332,300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will identify, locate and evaluate all children with disabilities who are in need of special education and related services.

4. The complainant alleges that requests for evaluation to determine J.C.K.'s eligibility for special education were made at the following times:

   a. in the fall of 1995, when J.C.K. was undergoing intense chemotherapy and as a result, he fell behind grade level. At that time J.C.K. was designated by SSI as disabled and had previously been enrolled for special assistance in Chapter One in another school district. According to the complainant, the teacher and staff responded to J.C.K.'s mother's request for services and/or accommodations by stating that the school did not have any programs or assistance to help with these challenges,

   b. at the time of the first parent teacher conference at Skyview Elementary that school year, when J.C.K.'s mother and father pleaded for assistance due to his disability causing him to fall behind 1 to 1 and 1/2 years. Two of his teachers (Ms. F. and Ms. G) allegedly were emphatic that there were no programs to assist J.C.K and that the programs that did exist to assist special students were filled to capacity,

   c. later during the 1995-96 school year, when J.C.K. showed signs of clinical depression and was in need of counseling, and

   d. at the beginning of the 1996-97 school year, when J.C.K. was exhibiting behavioral misconduct. The Principal (Ms. S.) stated that no special services were available in her building for special needs.

5. The District, in its response to the complaint, indicates that no special education referrals were made by J.C.K.'s mother or father (the comlplainant) prior to April 4, 1997. As a result of that referral, evaluations occurred and a meeting was held to determine eligibility for special education. Mr. and Ms. K. attended that meeting and agreed with the decision of the team that J.C.K. did not meet eligibility requirements for special education under the Act. Subsequently an accommodations plan was developed under Section 504 of the Rehabilitative Act.

The District, in its response to the complaint, indicates the following regarding this issue:

a. On November 9, 1995, at a parent conference, parents requested extra help in reading. In response to that request, J.C.K. was given a reading test on November 17, but did not qualify for special reading based on the results of that evaluation.

b. On March 16, 1996, at a parent conference, parents stated that J.C.K.'s grades were acceptable but that he needed to work harder; no request for a special evaluation was made.

c. In November, 1996, Mrs. K. stated to the teacher that she wanted J.C.K. to take more time and put more effort into his work; no request for an evaluation was made.

d. On March 26, 1997, Mr. and Ms. K. requested that J.C.K. be tested for reading. Again, testing indicated he did not qualify for special reading services as outlined in the District's Special Reading Guidelines.

6. The law is clear in that the District must identify, locate and evaluate all children with disabilities who are in need of special education and related services. Should the parents have requested an evaluation for determination of eligibility for special education, such evaluation must have taken place that that determination made; or the District must have provided notice of its refusal to do so and informed the parents of their procedural safeguards, including their right to appeal the refusal.

The question then, is did Mr. and/or Ms. K. request evaluation for special education services under the Act. Although the parents believe they did, there is no documentation of such a referral. The District indicates emphatically that no such request was made; and interviews suggest a special education referral was not likely to have been made.

The District's and the complainant's perceptions of whether or not a special education referral was made, are quite disparate. However, the process of complaint resolution does allow for taking testimony under oath for determining credibility; rather, it is one that relies on documentation of information. No documentation of a special education referral exists. In addition, it is significant that once a special education referral was made and evaluation did take place in April, 1997, J.C.K. did not meet eligibility requirements for special education under the Act. It, therefore, cannot be concluded that the District failed to evaluate J.C.K. to determine eligibility for special education.

III. CONCLUSIONS

Adams County School District #12 did not violate the provisions of the Act by failing to evaluate J.C.K. to determine eligibility for special education or failing to provide his parents with written notice of their procedural safeguards when refusing to initiate the evaluations requested by them.

IV. REMEDIAL ACTIONS

None.

Dated this 26th day of May, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 506

Status: Complaint Decision

Key Topics:
IEP
FAPE
Related Services

Issues:

- completion of IEP; copy to parents
- provision of curriculum modifications
- provision of OT and S/L

Decision:

- District did fail to initiate and conduct an IEP meeting for the purpose of review
- No other violations

Discussion:

FEDERAL COMPLAINT NUMBER 97.506

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on March 31, 1997.

B. The complaint was filed by Ms. Ms. K.H. on behalf of her daughter, H.H., against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent, and Dr. Joe Hendrickson, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint expires on May 30, 1997.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaints pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. H.H. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaints included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to complete the 11/25/96 individualized education plan ("IEP"),
- failing to provide the complainant with a copy of the IEP,
- failing to provide the curriculum modifications listed on the current IEP, and
- failing to provide speech language services and occupational therapy services according to the IEP, specifically not making-up time missed by the service-providers for illness or meetings.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. H.H. is a student with significant limited intellectual capacity as identified on an individualized education program ("IEP") dated 11/25/96. That IEP indicates the following special education and related services are to be provided weekly:

   - 14 hours of direct instruction in a moderate needs program,
   - 1.5 hours of speech services (30 minutes per day, 3 times a week)
   - 7.5 hours of ACE programming
   - 1 hour of direct occupational therapy.
   - services of a paraprofessional as appropriate

   In addition the IEP lists 17 content modifications, 2 environmental modifications, and 6 evaluation modifications to be provided.

5. Ms. K.H. alleges the following in her complaint:

   a. Regarding completion of the 11/25/96 individualized education plan ("IEP"):

      This year, the first meeting for an IEP was 11/25/96. The last meeting was 1/15/97. I received an IEP in process on 1/23/97. I made my remarks and returned them to the teacher. On 2/10/97, I asked when I would be receiving the final draft to the IEP and was informed that my remarks were "incorporated" into the IEP.

   b. Regarding providing the complainant with a copy of the IEP:

      On 3/13/97, I requested a typed, final draft. The responsibility of getting the IEP to me has been passed from person to person and has changed hands four times. To date, I have not received the final draft of the IEP.

   c. Regarding curriculum modifications listed on the current IEP:

There is a lack of appropriate modifications to the curriculum. The content and vocabulary of the curriculum is totally unrealistic and without meaning to her. The techniques used to teach are so far beyond her level of comprehension that boredom and failure are inevitable. If an assignment was modified, it was done so inappropriately. H.H. is given skills she already knows to keep her occupied. When she makes a mistake, the errors are not corrected.

I suggested that if the teachers were uncertain about how to make proper modifications, the school should consider the possibility of inviting Terry Rogers-Connolly (from the Colorado Department of Education, Special Education Services Unit) for staff development.

d. Regarding the provision of speech language services and occupational therapy services according to the IEP, specifically not making-up time missed by the service-providers for illness or meetings:

If the therapists are gone because of illness, meetings for other students or because there is no school on the usual day of therapy, H.H. automatically loses the session planned for that day. There are no makeup days. H.H. even lost her once a week OT session because she went to speech.

5. The Assistant Director of Pupil Services, in his response for the District, states the following:

a. Regarding completion of the 11/25/96 individualized education plan ("IEP"):

The IEP for H.H. started on 11/l4/96 and after eight separate IEP meetings, was finalized on 1/15/97. The completed IEP document was taken to Mrs. H. by H.H. on 1/23/97 along with a letter from H.H.'s teacher, S.J.

b. Regarding providing the complainant with a copy of the IEP:

Shortly after Mrs. H. received the copy of the IEP she requested 20 + items to be changed and/or incorporated into the IEP. The final revised copy of the IEP was sent to Mrs. H. on 3/28/97 by U.S. Mail

c. Regarding curriculum modifications listed on the current IEP:

In checking with S.J., H.H.'s primary special education provider and case manager on 4/15/97, she assured me the above modifications are being provided.

d. Regarding the provision of speech language services and occupational therapy services according to the IEP, specifically not making-up time missed by the service-providers for illness or meetings:

I specifically checked the absenteeism rate for the occupational therapist and the speech/language persons that serve Rocky Mountain High School. For the school year 1996-97, up through April 11, 1997, both support staff personnel have had lower than average illness days. H.H. may have missed some service when support staff attended one of the eight IEP meetings held for H.H. between November 4, 1996 and January 23, 1997.

The speech/language service provider serving Rocky Mountain High School this year has served H.H. 94% of the 37 scheduled times she was to meet with her. The occupational therapist said she missed one scheduled meeting time this school year but has seen H.H. on three non-scheduled occasions at H.H.'s job site (Foley's) after school, with the goal of teaching her to ride public transportation to her home from her job.

6. Records indicate the following regarding the triennial IEP meetings (note that meeting time totaled 14 hours and 30 minutes):

10/14/96	first triennial staffing set for 3:30 for H.H.; canceled by Mom
10/16/96	notification of 10/28 rescheduled meeting sent
10/28/96	second triennial staffing set for 3:30 - 3:45 for H.H.; canceled by Mom 10/25
11/4/96	third triennial staffing set for 7:00 - 7:40
11/25/96	triennial staffing from 1:30 - 5:00
12/9/I96	triennial staffing from 1:30 - 5:00
12/16/96	triennial staffing from 3:15 - 5:00
1/6/97	triennial staffing from 3:25 - 5:15
1/8/97	triennial staffing from 7:15 - 9:15
1/15/97	triennial staffing from 7:15 - 8:30
1/23/97	IEP delivered to Mom
3/5/97	Mom's responses to IEP received
3/17/97	finalized IEP requested by Mom
3/25/97	responses to K.H.'s IEP requests
3/27/97	IEP mailed to K.H.

7. The law is clear relative to the contents and development of IEPs.

   a. The District must initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP. The IEP is a record of the decisions of the IEP team made at the IEP meeting.

   b. Parents are expected to be equal participants along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents participate in the discussion about the child's need for special education and related services, and join with the other participants in deciding what services the agency will provide to the child

   c. There is no prescribed length of IEP meetings. In general, meetings will be longer for initial placements and for children who require a variety of complex services, and will be shorter for continuing placements and for children who require only a minimum amount of services. In any event, however, it is expected that agencies will allow sufficient time at the meetings to ensure meaningful parent participation.

   d. The District must give the parent, on request, a copy of the IEP. In order that parents may know about this provision, it is recommended that they be informed about it at the IEP meeting and/or receive a copy of the IEP itself within a reasonable time following the meeting.

8. The law is clear, also, relative to the District's obligations to provide a FAPE to all students with disabilities. Those services and modifications listed on an IEP must be provided.

9. It is obvious that the District's and the complainant's perceptions of individual educational planning and service provision are quite disparate. The process of complaint resolution, however, does allow for taking testimony under oath for determining

credibility. For that reason, this complaints investigator consulted with Terri Rogers Connolly, who (at the complainant's suggestion) visited the program at RMHS on April 4, 1997. The following information is from her written report of that visit.

"There appear to be many issues of trust between the staff and the families involved that have little to do with the actual services being provided at...school. It will take great effort from all stakeholders to engage in conversation that opens up the communication lines. Until the issues of trust are confronted, it will be difficult to resolve some of the service issues."

10. An analysis of the information relative to these allegations:

    a. Regarding completion of the 11/25/96 individualized education plan ("IEP"):

       Although there is no prescribed length of IEP meetings and sufficient time should be allotted to ensure meaningful parent participation, an IEP which takes 7 + meetings and 14 + hours to complete is highly unusual and not the norm. IEPs normally can be developed within one meeting and the parent receives a copy of the IEP at the end of that meeting. It is questionable as to whether the long time for completion is productive and positive, or just an indication of the lack of trust between the parents and the staff.

       IEPs may only be written during IEP meetings and may not unilaterally be changed by parents or staff. Technically, the changes proposed by the parent and agreed to by the staff are not legal, as they were not developed at an IEP meeting.

       While the complainant is concerned about an IEP not having been completed, she is clearly responsible for some of the delay.

    b. Regarding providing the complainant with a copy of the IEP:

       Records clearly indicate that a copy of an IEP was given to the complainant on 1/23/97 and that a copy of a revised IEP was sent to the complainant on 3/28/97.

    c. Regarding curriculum modifications listed on the current IEP:

       27 different accommodations or modifications were listed on the IEP. While the complainant alleges a lack of appropriate modifications, the District assures all modifications were provided. The issue of accommodations was addressed in the report of Terri Rogers-Connolly.

    d. Regarding the provision of speech language services and occupational therapy:

       While the complainant alleges lack of services due to no make-up for times missed for illness or meetings or school closure on those days, the District alleges low absenteeism by these service providers, specifically stating that the occupational therapist missed only one session and the speech/language specialist missed only 3 or 4 sessions out of 37. There is some possibility that direct sessions may have been missed in order to attend the numerous IEP meetings which were held. The District is required to provide a FAPE which means generally the service listed on the IEP must be provided. However, a service provider would not be expected to be an IEP meeting and providing direct services to the student at the same time. Neither would it be expected for a service provider to provide services during the time in which school is not in session. The District would be expected to provide compensatory time for any sessions missed due to service provider illness; however one or to days of illness would not constitute the lack of provision of a FAPE.

III. CONCLUSIONS

Poudre School District has not violated the provisions of the Act by failing to provide a FAPE, specifically by not completing the 11/25/96 IEP, by not providing the complainant with a copy of the IEP, by not providing the curriculum modifications listed on the current IEP and by not providing speech language services and occupational therapy services according to the IEP. The IEP was completed and copies were provided. There appears to be a difference of opinion on how curriculum modifications were made, and this has been addressed by another CDE staff person. Most speech language sessions were held, and the one occuptional therapy session missed was compansated for.

Poudre School District has violated the provisions of the Act by failing to initiate and conduct an IEP meeting for the purpose of reviewing and revising the IEP. Clearly records indicate the IEP for H.H. was revised by Ms. K.H. unilaterally and the District accepted those revisions.

IV. REMEDIAL ACTION

The District must immediately terminate its practice of allowing changes to an IEP to be made other than as part of an IEP meeting. The next IEP for H.H. must be developed at the IEP meeting with a copy of the IEP given to Ms. K.H. as the end of that meeting. Should the District choose to later type the decisions of the IEP team made at the meeting, it may do so; but in the interim, give the hand-written IEP to Ms. K.H. The typed version of the IEP must match the hand-written version. No changes may be made, other than through the IEP reveiw process.

No later than one month after the next IEP meeting for H.H., the District must provide this office with written assurance that the above was done.

V. RECOMMENDATIONS

It is strongly recommended that the District streamline its IEP process to facilitate IEP development in a lesser amount of time. Should the District so choose, this office will be happy to provide an IEP facilitator/mediator to assist with this process at the next IEP meeting for H.H.

It is strongly recommended that the District and complainant (with, perhaps other complainants with students in this program) agree to mediate to resolve these trust issues. Should the District so choose, this office will be happy to provide a mediator to assist with this process.

Dated this 30th day of May, 1997

Carol Amon

~~Carol~~ Amon, Federal Complaints Investigator

Case Number: 97:507

Status: Complaint Decision

Key Topics: Individualized Education Plan
Goals
Modifications
Extra Curricular Activities

Issue:

- Provision of special education resource support for math, reading and language arts in accordance with IEP
- Determination of whether or not student had achieved goals
- Provision of modifications as listed on IEP
- Denial of extra curricular activities because of failing grades which were a result of lack of provision of modifications

Decision:

- The District did not violate the Act in reference to the issues stated above.
- However, they have violated the Act by:
    - failing to state the amount of service to be provided so that the commitment of resources and the manner in which services will be delivered will be clear to all who are involved in both the development and implementation of the IEP. Services "up to one hour per day" is not clear;
    - failing to write specific, targeted annual goals which describe what a child with a disability can reasonable be expected to accomplish within a twelve month period; and
    - failing to write short term instructional objectives which are measurable, intermediate steps between the present levels of education performance and the annual goals, based on a logical breakdown of the major components of the annual goals, and serving as milestones for measuring progress toward meeting the goal.

Discussion:

FEDERAL COMPLAINT NUMBER 97.507

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on May 19, 1997.

B. The complaint was filed by Ms. D.T. on behalf of her son, D.T. against the Peyton School District, Mr. Chad Chase, Superintendent ("the District")., and against the Pikes Peak Board of Cooperative Services, Mr. Robert Cito, Executive Director and Dr. John Sansone, Director of Special Education ("the BOCS").

C. The timeline within which to investigate and resolve this complaint expires on July 28, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District and the BOCS as recipients of federal funds under the Act. It is undisputed that the District and the BOCS are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. D.T. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCS have violated the provisions of the Act by:

- failing to provide special education resource support for math, reading and language arts in accordance with D.'s individualized education plan ("IEP") from the beginning of the 1995-96 school year to December 6, 1995,

- failing to determine whether or not D. had achieved those goals written for the 1995-96 school year ,

- failing to provide the modifications listed on the IEP during the 1996-97 school year, and

- denying any extra curricular activities because of failing grades which were a result of lack of provision of modifications.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCS were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and the BOCS, in part, based on the assurances contained within the application.

3. One of the assurances made by the District and the BOCS is that in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.

4. D.T. is a student with perceptual communicative disabilities as identified on an IEP dated 6/1/92. IEPs are on file for D.T. dated: 6/1/92, 4/19/93, 3/8/94, 2/21/95, 5/3/95 (addendum), 3/12/96, and 4/14/97.

5. The complainant alleges the following:

   a. *The District and the BOCS failed to provide special education resource support for math, reading and language arts in accordance with D.'s IEP from the beginning of the 1995-96 school year to December 6, 1995.* This was evidenced by:
      (1) her meeting with the counselor and special education teacher on 9/8/95 when they told her they did not know D.T. was in Special Education,
      (2) her meeting with a teacher on 11/2/95 when she stated she was unaware that D.T. was in special education,
      (3) D.T.'s 6th grade papers showing that D.T. received services beginning on 12/6/95 as a result of a phone call to the BOCS.

   b. *The District and the BOCS failed to determine whether or not D. had achieved those goals written for the 1995-96 school year* as evidenced by:
      (1) no paper work,
      (2) the 5th and 6th grade IEPs being nearly identical with the beginning and ending dates for his goals being the same (3/21/96),
      (3) The reading teacher's not answering the parent's question as to whether or not D.T. met his goals from last year's IEP,

(4) The special education teacher stating that he did not meet his goals from the 5th grade year and that he would say no to his having met the goals from the 6th grade year.

c. *The District and the BOCS failed to provide the modifications listed on the IEP during the 1996-1997 school year* as evidenced by:

(1) The social studies teacher reporting at a 4/16/97 meeting that she modifies some of his work, but does not modify his test scores,

(2) The science teacher reporting that he modified the 1st quarter but did not modify the 2nd or 3rd,

(3) The counselor reporting that he was never notified that D.T. was in special education,

(4) The math teacher reporting (through another teacher) about grade only modifications,

(5) the following teachers' responses to the parent's question as to whether or not they had read D.T.'s IEP:

- Reading teacher: No
- English teacher: I have not looked at it.
- Social studies teacher: I never saw or asked for the IEP.
- Science teacher: I can't remember if I saw the IEP.
- Special education teacher: Teachers really don't need them, but have access to the records and must sign for them.

(6) All teachers indicating they had seen D.T.'s modified schedule.

d. *The District and the BOCS denied any extra curricular activities at Peyton School because of failing grades which were a result of lack of provision of modifications.* The complainant alleges she has received approximately ten form letters stating "Your child is currently receiving a failing grade in the following subject:.....Therefore he is ineligible to participate in any extra-curricular activity for the week of ....." Subjects included social studies, science, reading, and language.

6. The BOCS asked the District to respond to this complaint and that response indicates the following:

a. *Regarding the failure to provide special education resource.*

- The school principal states that D.T. received resource room services a minimum of 60 minutes per day during the entire 1995-96 school year.
- The special education teacher has stated that he spent one-on-one time with D.T. for a minimum of one hour per day (and often closer to one and a half hours) from approximately 9/1/95 to the end of the school year.

b. *Regarding the failure to determine whether or not D. had achieved goals.*

- The school principal states that the goals for the 1995-96 school year were reviewed at the 3/12/96 IEP meeting and progress was noted on the 2/21/95 IEP. One goal was not attained and was carried forward to the 1996-97 IEP.

c. *Regarding the failure to provide the modifications listed on the IEP.*

- The school principal states that the special education instructor verbally consulted with all of D.T.'s teachers in the fall of 1996, providing them with information concerning the program of instruction for D.T. This was followed by a review and written outline in January and April of 1997. Daily assignments, tests and grades were modified.

- The math teacher states he was informed of D.T.'s needs in late October and that he received a list of modifications for D.T. on January 6th, then a modified list on April 14th. Throughout the year the following modification were made: directions and explanations were given several ways, lessons were reviewed at the end, and extra time was allotted for D.T. to finish tests; test grades were modified very heavily (sometimes as much as 30 - 40 points).

- The social studies teacher states she provided the following modifications: making certain directions were both seen and heard, paraphrasing of directions and checking for understanding; extra time to complete assignments; grades based on effort and content rather than mechanics; reviews before every test; eliminating time limits for tests and assignments; as well as preferential seating.

- The reading teacher states that D.T. had preferential seating; directions were paraphrased several times; directions for tests were both verbal and written and always repeated for D.T.; directing him back on task; separating him from other students when necessary; grades on what was done and no deductions for mechanical errors.

- The science teacher provided extra time to complete assignments; credit was given for partial assignments; points for effort; allowing D.T. to work with a peer; provisions of notes from each lesson and review of those notes; personal review before a test; extra time to compete a test; "open notes" testing; modified tests scores; and preferential seating.

- The English teacher provided preferential seating; encouragement to stay on task; varied instructions using listening and reading; one-on-one checks of understanding; repeating; re-explaining; doing example problems; weekly conferences with special education teachers regarding progress; opportunities to rehearse prior to a test; shortened assignments; graphic organizers; prewriting assignments; tests taken at home; points for effort; allowing for late assignments; and progress reports on missing assignments

d. *Regarding denying any extra curricular activities.*

- The school principal states that D.T. was allowed to play sports in the 6th grade whether he was passing or not. It was his mother, however, who stated that she did not want him playing until he raised his grades. During the 1996-97 school year his participation was denied due to non-compliance with the modified assignments. Every effort was made through modification to allow him to participate.

7. A review of the records indicates the following:

a. *Regarding the failure to provide special education resource.*

(1) the IEP dated 2/21/95 states that D.T. was to receive regular education with special education resource support for math, reading and language arts "up to" one hour per day, 4 times a week.

b. *Regarding the failure to determine whether or not D. had achieved goals.*

(1) The 2/21/95 IEP lists three goals with accompanying short term instructional objectives ("STOs"):

- to improve math,

two objectives listed; one was completed on 11/14/95, the other was not attained and was carried over.

- to improve reading, and
  one objective listed which was completed on 1/8/96
- to improve language arts
  one objective listed which was not attained and was modified for the next IEP

(2) The 3/12/96 IEP lists three goals:

- improve written language skills
  one objective with same beginning and ending date
- improve his math skills
  one objective which was carried over from the previous IEP with same beginning and ending date
- improve organizational skills
  one objective with the same beginning and ending date

(3) Two versions of the 4/14/97 IEP exist. The first lists two goals:

- demonstrate competence in study skills
  three objectives listed
- improve his math skills
  one objective listed which is the same objective listed on the previous two IEPs.

The second version lists three goals:

- demonstrate competence in study skills
  four objectives listed
- improve his math skills
  four objectives listed, one of which is the same as prior IEPs
- increase his written language skills
  two objectives listed

c. *Regarding the failure to provide the modifications listed on the IEP.*

(1) The IEP dated 2/21/95 states that modifications are necessary for the student to participate in the general education program, specifically modifications to curriculum, instructional strategies and methods of presentation. These modifications are not specified other in the "Statements of Educational Needs" which state:

- needs opportunity to move to an area where he can work without disturbance from environment
- needs extra time for math and reading
- needs extra time for testing situations that require reading
- may need highlighted social studies and science book for direction to important passages and reading assignments
- needs modified math and reading and language arts curriculum
- needs lots of drill and practice on new concepts until mastery.

(2) The records contain a list of Instructional Modifications dated 1/6/97 and have 17 modifications checked as those required by the IEP. They are:

- opportunity for increased response time
- directions given in more than one way
- paraphrasing information
- extended time to complete assignments
- shortened, modified, fewer, or taped assignments
- more frequent opportunity for review
- assignment notebook

- extended time for tests as needed
- reduced number of essay questions
- modified tests
- special study sheets
- given rehearsal devices
- spelling lists and/or assignments shortened
- spelling not counted in grade
- extra time for or shortened reading assignments
- teacher initiated signals for redirecting attention

variety of modality input

(3) The IEP dated 3/12/96 states that modification of instructional strategies is necessary, specifically "breaking instructions down into very small steps."

(4) The records contain a list of Instructional Modifications dated 4/14/97 and have 18 modifications checked as those required by the IEP, one new one added to the 1/6/97 list which is "preferential seating - close to direct instructional area".

d. *Regarding denying any extra curricular activities.*

(1) A letter to the complainant dated April 7, 1997, states "Your child is currently receiving a failing grade in the following subject: social studies. Therefore he is ineligible to participate in any extra-curricular activity for the week of April 7-12."

7. The law is clear relative to the following:

a. Those **services** listed on IEPs must be provided. The **amount** of service to be provided must be stated in a manner that is clear to all who are involved in both the development and implementation of the IEP.

b. IEPs must include **annual goals** (statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period), **short term instructional objectives** (measurable, intermediate steps between the present levels of educational performance and the annual goals, based on a logical breakdown of the major components of the annual goals, and serving as milestones for measuring progress toward meeting the goal) **and objective criteria and evaluation procedures and schedules.**

c. If **modifications** to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP and they must be provided.

d. **Extra curricular activities** may be denied for a student with disabilities because of failing grades, so long as that denial is not discriminatory relative to students with disabilities, and so long as the IEP and services are designed to afford the student the opportunity to achieve and make passing grades.

9. An analysis of the allegations, the District's response, and records reveals the following:

a. *Regarding the failure to provide special education resource support for math, reading and language arts in accordance with D.'s IEP from the beginning of the 1995-96 school year to December 6, 1995.*

The IEP states D.T. was to have received "up to" one hour per day, 4 times per week of special education services. The complainant alleges services were not provided during the first three months of the school year as evidenced by various persons stating they were not aware D.T. was "in special education" and that special education did not begin until she contacted the BOCS director of special education. The District, on the other hand, responded that resource room services were provided for a minimum of one hour per day from 9/1/95 to the end of the school year.

The 2/21/95 IEP does not state a specific amount of service, but rather "up to" one hour per day. This type of statement does not include the specific amount of service, stated in such a way that the commitment of resources is clear to all.

b. *Regarding the failure to determine whether or not D.T. had achieved those goals written for the 1995-96 school year.*

IEPs for D.T. contained goal areas such as to improve reading, math, language arts, and written language and to demonstrate competence in study skills. "To improve reading" is not a specific targeted goal and does not describe what the student can reasonably be expected to accomplish within a twelve month period. "Goals" such as "to improve reading" do provide a way for the student's teachers and parents to be able to track his progress; rather they need to be much more specific, such as "identify and use strategies which assist him in understanding unknown words in materials of interest to increase his reading level with these materials".

Records indicate that D.T. did not attain two of his three "goals" for the 1995-96 school year; there is no indication as to whether the goals for the 1996-97 year were attained, although one of the objectives under a math goal for 1997-98 is the same objective written for 1995-96 which was not attained, and written again for 1996-97 and presumably not attained.

The goals areas for 1995-96 listed only one or two objectives. These clearly were not intermediate steps between the present levels of educational performance and a specific goal, based on a logical breakdown of the major components of the annual goals. These single objectives could not serve as milestones for measuring progress toward meeting goals.

c. *Regarding the failure to provide the modifications listed on the IEP during the 1996-1997 school year.*

IEPs for D.T. list 6 modifications, 17 and then 18 different modifications. The complainant alleges these were not provided as service providers were not aware of them and had not seen D.T.'s IEPs or lists of modifications. The District, however, states that the special education teacher consulted with all of D.T.'s teachers in the fall of 1996 and provided them information on modifications to be provided. Five of D.T.'s teachers listed the modifications they provided. One of those teachers indicated that he was informed of D.T.'s need for modifications until late October and not given a list of those modifications until January.

d. *Regarding denying any extra curricular activities at Peyton School because of failing grades which were a result of lack of provision of modifications.*

The complainant alleges she has received approximately ten form letters stating that her child was receiving failing grades and therefore ineligible to participate in any extra-curricular activities for a given week. The school principal did not comment on the form letters but indicated that D.T. was allowed to play sports in the 1995-96 school year but not during the 1996-997 year due to D.T. non-compliance with the modified assignments.

10. This complaint investigator provided the complainant with a copy of the District's response including the letters from various teachers, and she was offered the opportunity to provide additional information relative to the response. In a telephone conversation, the complainant stated clearly that information provided by the principal and teachers is in direct conflict with statements they made to her relative to their non-awareness that D.T. was to receive special education. She believes strongly that services were not initiated until December of the 1995-96 school year, that modifications were not made by teachers until January of the 1996-97 school year, that goals and objectives were never evaluated as her copies of IEPs are blank relative to that area, and that D.T. was denied extra curricular activities due to his receiving all the form letters relative to failing grades. As a result, she has moved from the District and D.T. will be attending school in another district within the BOCS.

11. It is obvious that the District's and the complainant's perceptions relative to all the allegations are quite disparate. The complainant strongly believes her allegations hold, even after reviewing the District's response including letters from D.T.'s teachers. She suggests that the response does not at all accurately reflect what happened and that the teachers have reported different information to her. The process of complaint resolution, however, does allow for taking testimony under oath for determining credibility.

III. CONCLUSIONS

1. The District and the BOCS have not clearly violated the provisions of the Act by failing to provide D.T. with a free appropriate public education ("FAPE") by:

   - failing to provide special education resource support for math, reading and language arts in accordance with D.'s IEP from the beginning of the 1995-96 school year to December 6, 1995,

   - failing to determine whether or not D. had achieved those goals written for the 1995-96 school year ,

   - failing to provide the modifications listed on the IEP during the 1996-997 school year, and

   - denying any extra curricular activities because of failing grades which were a result of lack of provision of modifications.

2. The District and the BOCS have violated the provisions of the Act, however by:

   - failing to state the **amount** of service to be provided so that the commitment of resources and the manner in which services will be delivered will be clear to all who are involved in both the development and implementation of the IEP. Services "up to one hour per day" is not clear.

- failing to write specific, targeted **annual goals** which describe what a child with a disability can reasonably be expected to accomplish within a twelve month period),
- failing to write **short term instructional objectives** which are measurable, intermediate steps between the present levels of educational performance and the annual goals, based on a logical breakdown of the major components of the annual goals, and serving as milestones for measuring progress toward meeting the goal.

3. This complaints investigator is concerned about the District's philosophy of special education when it writes the same objective for a student over a three year period, with the student never having achieved that objective and the District not altering its service delivery. Only two of the four objectives were achieved that year, however this was not addressed nor services changed. Special education is designed to provide students with disabilities with an "appropriate" education, one in which they have a reasonable chance to succeed, one which affords the student the opportunity to achieve and make passing grades, and one in which the district makes a good faith effort to assist the student in achieving the goals and objectives.

IV. REMEDIAL ACTION

Beginning immediately, all students with disabilities within the District must have IEPs developed, as scheduled, in accordance with the Act, specifically as it relates to goals, objectives and statements of the amount of service. As evidence of this, on or before January 1, 1998, the District must send to this office a copy of three students' IEPs, one each from elementary, middle and high school, developed between now and January 1st.

V. RECOMMENDATIONS

It is highly recommended that the BOCS special education staff meet with the staff within the Peyton School District to discuss and clarify, if necessary, the purpose of special education and the process for IEP development.

Dated this 28th day of July, 1997

Carol Amon
____
Carol Amon, Federal Complaints Investigator

Case Number: 97. 508

Status: Complaint Decision

Key Topics: FAPE
Evaluation

Issues:
- provision of specific instruction
- involvement of specific persons for evaluation

Decision:
- technical violation, but did not constitute failure to provide FAPE
- all required persons on evaluation team

Discussion:
- huge issue relative to trust

FEDERAL COMPLAINT NUMBER 97.508

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on June 2, 1997.

B. The complaint was filed by Ms. S.G. on behalf of her son, H.G.. against Eagle County Schools, Mr. John Hefty, Superintendent and Ms. Jane Huffstetler, Director of Special Education ("the District"), and against the Mountain Board of Cooperative Services, Mr. Steven M. Jones, Executive Director and Ms. Becky Minnis, Director of Special Education ("the BOCS").

C. The timeline within which to investigate and resolve this complaint expires on August 1, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District and the BOCS as recipients of federal funds under the Act. It is undisputed that the District and the BOCS are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G H.G. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCS have violated the provisions of the Act by:

- failing to provide .5 hours per week of social skills (friendship) instruction by the school counselor during the 1996-97 school year, as indicated on the 5/6/96-9/19/96 developed IEP.

- failing to involve members of the evaluation team (specifically the speech/language specialist, occupational therapist and psychologist) or some other person knowledgeable about the evaluation procedures used with H.G. and familiar with the results of the evaluation, in the development of an IEP subsequent to a February, 1997 evaluation.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.344, 300.346, 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCS were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and the BOCS, in part, based on the assurances contained within the application.

3. One of the assurances made by the District and the BOCS is that in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.

4. H.G. is a student with perceptual communicative disabilities and pervasive developmental disorder as identified on an IEP dated 5/6/96 and 5/23/96 developed as part of a triennial review.

5. An IEP dated 9/19/96 states that H.G. is to receive 2.5 hours per week of collaborative services from the special education resource teacher, **.5 hours per week of direct social skills (friendship) instruction from the school counselor outside the classroom**, 1 hour per month of consultive services from the speech/language specialist and occupational therapy consultation as needed.

6. This complaints investigator first was contacted by Ms. S.G. at the end of October, 1996, when she requested assistance in obtaining an appropriate IEP for H.G.. She stated that although meetings had been held in May, September and October, she did not feel the IEP was instructional and that the goals and objectives were of concern. A reply dated 11/4/96 provided information about IEPs, goals, objectives and classroom instructional plans; and stated that a review of the goals for H.G. indicated they appeared to meet all requirements of the law. It appeared that one of S.G.'s issues was with the appropriateness of th0se objectives and she was informed that she could exercise her right to appeal any IEP teams decisions, including objectives, through a due process hearing. The main issue appeared to be the lack of stated methods of instruction, strategies and materials which are not listed on IEPs but rather are the responsibility of the licensed teachers.

7. Ms. S.G. then, at the end of the school year, filed a formal complaint alleging H.G. did not receive counseling services. She indicated that she had talked with the principal in October about this situation but it was not resolved. She then talked with the District's

director of special education in May, explaining the situation and requesting compensatory services. She allegedly was told by the Director that these services were provided through classroom instruction and a voluntary group that H.G. was invited to attend, but chose not to. It is the complainant's contention that participation in the classroom instruction and a voluntary group do no fulfill the requirements of the IEP.

8. A letter from the principal to the complainant dated 11/18/96 states that "participating in the classroom counseling session does meet that particular service description". It also discusses adding a one-time-per-month lunch group. In-classroom friendships groups/counseling sessions were documented by the school counselor.

9. A letter to the principal from the school counselor dated 6/12/97 indicates she was unaware that the services in question were direct services outside of the classroom. She did outline some sessions in which she worked with H.G. outside the classroom including 2-3 occasions on the playground and assisting H.G. in arranging a pizza party. In December, when she suggested to H.G. that they meet once a week to prepare for the lunch group, he reluctantly agreed to meet for 10 minutes every Wednesday morning because that was all the time he felt he could spare being out of the classroom. (According to the Director of Special Education, he only attended once.) After winter break she went to the classroom on one or two occasions to get H.G., but he was very reluctant to come with her, expressing his concern over missing directions in the classroom. (According to the Director, the counselor did not force him to attend due to his being uncomfortable and not wanting to look any different from any other students. A small group was started in January but, again, H.G. attended only 2-3 times for 40 minutes.

10. The District's Director of Special Education, in her response to this complaint, states the following:

    a. Although the counselor thought she was following the IEP when working on social skills within the classroom setting, this was not in specific compliance with the IEP. Also she should have requested an IEP meeting to discuss H.G.'s non attendance in the group counseling sessions.

    b. The special education teacher did work on the social skills with H.G. by seeing him one time a month during lunch time, second semester.

    c. Upon realizing this in June, the Director attempted to resolve this matter with the complainant by offering H.G. 4 hours of private counseling and then increasing the offer to 7 hours, during the course of conversation with the complainant. She contacted a counseling service through Health and Human Services, which provides counseling of a higher degree than school counseling, at a rate of $80 per hour. She then offered the complainant private counseling by a certified counselor of her choice not to exceed $560 (calculated at 7 hrs. X $80). According to the Director, the complainant did not accept the compensatory service, but preferred to go through the formal complaint process.

11. The complainant, in letter to the Director dated 6/11/97, stated her position on the offer of compensatory services. The complainant agreed that incidental times of counseling should have been ongoing and that this provided a natural support for H.G. in his school environments. She questioned, however, when more meaningful interaction and teaching of social skills took place, stating that she needed to see the notes that were kept, the results of group meetings, the skills that were worked on in order to be

convinced that H.G.'s needs were addressed. In her letter, the complainant asked the District 18 specific questions such as:

Were the sessions meaningful and documented?
What steps were taken early in the year to establish a relationship with H.?
How was the classroom curriculum followed up on to address H.'s issues?
What was used to motivate H.?
How was H. helped when he got "stuck"?

Again, she confirmed her desire for resolution of this matter through the formal complaint process.

12. The District's Director, in response to the complaint offered the following:

"Based on the counselor's lack of understanding in providing .5 hour direct outside classroom services and not reconvening the staffing team to address the student's refusals to attend, and [the complainant's] disappointment and feelings of loss in the positive affects that a counselor could have had on [H.G.'s] education, a good solution would be for Eagle County School District to offer to make up for the lack of services by offering counseling next year for .5 hours a week in addition to what he will already be receiving." She also stated that consult will be made available to H.G.'s new counselor at the middle school for a half day so she can learn more about Autism Spectrum Disorders.

13. The complainant also alleges that, on 5/1/97 and 6/5/97, the District and the BOCS failed to involve members of the evaluation team (specifically the speech/language specialist, occupational therapist and psychologist) or some other person knowledgeable about the evaluation procedures used with H.G. and familiar with the results of the evaluation, in the development of an IEP.

14. The Act and its regulations clearly indicate the necessary participants in IEP meetings. They are:

- a representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education,
- the child's teacher,
- one or both of the child's parents (subject to other regulations),
- the child, if appropriate, and
- other individuals at the discretion of the parent or agency.

For a child with a disability who has been evaluated for the first time, the public agency shall ensure that a member of the evaluation team participates in the meeting or that the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

15. The IEP developed on 5/1/97 and 6/5/97 was an annual review and not a triennial review as a result of reevaluation. The triennial review was held the previous year. Therefore, a member of the evaluation team was not required to participate.

16. The District, in its response to the complaint states that the OT could not attend due to car problems on 5/1/97 but did attend the continued meeting. In addition to the elementary school team being in attendance, the receiving middle school was represented by the principal, special education teacher and sixth grade teacher.

In addition, the entire IEP team had copies of the results of the independent educational evaluation requested by the parents and provided at the District's expense; and the team utilized the recommendations in the IEP development which took three hours.

17. In reviewing the records of the 5/1/97-6/5/97 IEP, it is again apparent that the complaint has numerous suggestions and questions. 26 specific questions were prepared for the team including:
    - How will issues of teasing, verbal abuse be addressed, found out, monitored, handled?
    - How can we utilize and incorporate natural strengths, interests and abilities...?
    - How can we create structured "unstructured" time for H. so that social areas can be worked on?
    - What will H.'s first day of school look like; how will his schedule and routine be established; how will relations by service providers be established?

18. It is apparent to this complaints investigator that the complainant does not trust the professionals in the school to do their job and that the professionals do not trust the complainant's willingness to work together. The complainant's initial letter, the complaint, and records all suggest her issues are related to her wanting to know specific instructional methods, specific strategies and who will do what, when and that there is not trust that the professionals know how to work with H.G. or that they will work with him appropriately . Several notations in the records indicate that IEP meetings are far longer than normal, to allow for the complainant's need for revisions and requests for information on strategies and methods. She has requested numerous consultations and inservice trainings, some of which the District and/or BOCS have provided.

III. CONCLUSIONS

Although the District and the BOCS technically violated the provisions of the Act by not providing .5 hours per week of social skills instruction outside the classroom by the school counselor, this does not suggest the District's and BOCS' failure to provide a free appropriate public education to H.G. Much social skills instruction was given within and outside the classroom, both by the counselor and special education teacher, in spite of H.G.'s often refusing to participate. Resolution of this matter should be in the hands of the IEP team, taking into consideration the desires of H.G.; resolution by this complaint's investigator is not appropriate, nor in the best interest of H.G..

The District and the BOCS did not violate the provisions of the Act by not including members of the evaluation team in the annual review in May and June of 1997. The team had all required participant and several additional persons.

IV. REMEDIAL ACTION

None.

V. RECOMMENDATIONS

1. It is suggested that the District staff and the complainant address this overall issue of reciprocal trust. Ms. S.G. needs to believe and feel confident that the District staff members are both willing and able to provide appropriate services to H.G.. District staff members want to be appreciated, seen as helpful and not feel threatened. The Colorado Department of Education would be happy to provide a professional mediator who could sit down with parties to discuss and, hopefully, resolve this larger issue of reciprocal trust.

> Schools are required to provide an appropriate (as opposed to "Cadillac") education to students with disabilities, that is an education that affords the student a reasonable chance to succeed and an opportunity to achieve the District's standards. Districts must make good faith efforts to assist the students in achieving their goals and objectives; and they must provide licensed educators to assist in that endeavor. Special and regular educators then need to be trusted to provide those services for which they were trained and licensed.
>
> IEP teams develop an overall educational plan, one which they believe will allow the student to achieve goals and objectives. Parents and educators review the achievement of those goals and objectives as an indication of whether the educational plan is working. If not, the plan must be reviewed and revised. Decisions as to specific methods and strategies used each day are to be made by the trained educators, not IEP teams.

Perhaps a discussion of this issue could focus on what it would take for S.G. to feel more confident about the service providers and their abilities so that the concerns and questions about "who does what, when, and how" could be lessened.

2. It is highly recommended that the District, as a good faith effort, offer to the complainant the compensatory services listed in Finding #12 of this complaint. Perhaps this could be the beginning of the development of a plan for gaining reciprocal trust.

3. It is also recommended that the District utilize an outside facilitator for the next IEP meeting for H.G. to assist in the development of an appropriate IEP within a reasonable time frame, to facilitate and perhaps narrow discussions to those issues within the jurisdiction of IEP teams, and to assist with developing behaviors among all team members that may be viewed as more trusting.

Dated this 31st day of July, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 509

Status: Complaint Decision

Key Topics: Individualized Education Plans

Issues: Teacher's unilateral development of IEP
Assistive Technology Device

Decision: District did violate the law by default.

Discussion: District was trying to negotiate a settlement with the parent but failed to respond to the complaint within the 15 day and the 60 day time period.

FEDERAL COMPLAINT NUMBER 97.509

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on June 10, 1997.

B. The complaint was filed by Mr. W.G. and Ms. M.G. on behalf of their daughter, J.G., against the Poudre R-1 School District, Dr. Don E. Unger, Superintendent, and Dr. Joe Hendrickson, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint was to have expired on August 11, 1997, but was extended to August 25, 1997.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaints pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G J.G. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaints included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to conduct meetings for the purpose of developing, reviewing and revising J.G.'s IEP, specifically by:
    - not granting reasonable requests of the parents for IEP reviews,
    - making unilateral administrative placement decisions, other than within the IEP meeting and

- a resource teacher developing part of the IEP unilaterally, other than within the IEP meeting,

- and by failing to provide access to a computer with word prediction software in the regular education classroom during the 1996-97 school year, as stated on the IEP.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.346, 300.533, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. The District was given 15 days from the date of receipt of this complaint to respond to the allegations and provide this office with whatever information it believed was relevant to the investigation of the complaint. Certified mail records indicate the complaint was received on June 20, 1997. Therefore a response was due on July 7, 1997.

5. The District did not respond to the complaint, but rather the director of special education contacted this complaints investigator by telephone indicating that some of the allegations may be accurate and requested the opportunity to resolve this matter with the complainants. The director was informed that if he could reach resolution with the complainants, the complainants could withdraw the complaint. Subsequent communication from the director indicated a resolution and withdrawal was forthcoming.

6. On August 6, 1997, having not received the withdrawal request, this complaints investigator contacted the complainants via telephone message indicating the need for the withdrawal request in writing. The complainants responded via telephone message on August 8, 1997, indicating resolution had not been reached and that, in fact, they were not aware of any potential withdrawal. They also indicated they strongly wanted this office's assistance in the resolution.

7. Subsequently, this complaints investigator left a telephone message for the District's director on the afternoon of August 8, 1997, relaying the above information and requesting an immediate response to the complaint by facsimile, as resolution was due on August 11, 1997. No response was received.

8. This complaints investigator contacted Ms. M.G. by telephone on August 11, 1997, to discuss this situation. She stated that she was willing to extend the timeline for resolution of this complaint by two weeks, in order to give the District the opportunity to respond and the complaints investigator the opportunity to review the response.

9. A letter was sent to the complainants and to the District's superintendent and director of special education on August 11, informing them of the extension and indicating that the complaints investigator would consider any response to the complaint or information received in her office by noon on August 18, 1997. A copy of that letter was sent to the District by facsimile on August 11, 1997. The letter also stated that "should the district not respond, I will consider that to be an indication of acceptance of the allegations and will issue findings and remedial actions accordingly".

10. The complaints investigator subsequently received a telephone call from the director's secretary, indicating the director's intent to respond and thanks for the extension of the timeline.

11. No response was received from the District by 2:00 p.m. on August 18, 1997. The complaints investigator called the District's director to determine if a response had been sent by facsimile. The director indicated he was not aware of the deadline and needed additional time to conclude his negotiations with the complainants. His request was denied.

12. This complaints investigator has no choice but to accept the allegations in this complaint and order the compensatory services and remedial actions requested by the complainants and agreed to thus far by the director and the complainants in their negotiations.

13. The allegations as made by the complainants are:

Re: failing to conduct meetings for the purpose of developing, reviewing and revising J.G.'s IEP, specifically by not granting reasonable requests of the parents for IEP reviews

Principal refused M.G.'s request for continuance of an IEP meeting to complete the development of the IEP. Instead, he indicated that they had met too many hours as is, and that it would be finished by a resource room teacher.

Re: failing to conduct meetings for the purpose of developing, reviewing and revising J.G.'s IEP, specifically by making unilateral administrative placement decisions, other than within the IEP meeting

Principal held meeting on 4/9/97 to tell parent, advocate, and teachers who would be J.G.'s primary provider for next year. He stated that J.G.'s needs were not served best within the Hearing Impaired Program, and that J.G. would have regular resource teachers as her primary providers. He also stated that he was not so sure she even needs an IEP.

Principal stated that there can be some 'tweaking' of the general education program, but that J.G. must either fit into the regular education program, or receiver her support in the resource room...that this school is not going to change the regular education program...either the child fits the program or has her needs met in a pull-out program.

When parent left the IEP meeting on 5/12/97 to use the restroom, the principal told his staff that he was leaving, but they knew the direction he wanted and they were to stick with it.

When parent requested that regular monthly meetings for communication purposes be held, principal stated that couldn't be done and could not be written into the IEP.

A staff member has indicated that, although she/he believes J.G. needs more support in the regular education room because she is often lost, she/he is unwilling to share that information with the IEP team for fear of losing her/his job.

Re: failing to conduct meetings for the purpose of developing, reviewing and revising J.G.'s IEP, specifically by a resource teacher developing part of the IEP unilaterally, other than within the IEP meeting

Principal would not discuss need for an aide, but rather stated that he wanted to see what the regular resource room teacher had written on the IEP she developed.

Principal stated that the regular resource room teacher will finish writing the IEP, that the meeting could not be continued.

Although the IEP team decided that the teacher of hearing impaired would team teach reading with another teacher, the principal told the teacher of hearing impaired that he did not want her doing that and that she was out of the picture.

Re: failing to provide access to a computer with word prediction software in the regular education classroom during the 1996-97 school year, as stated on the IEP

J.G.'s access to technology that supports her written and verbal speech was restricted to the special education classroom only, and was not available within the regular education setting, even though her IEP states "visual and manipulative tools, i.e.....computer with word prediction software [to be] available in both resource room and regular classroom".

A letter from the principal to the complainants dated April 21, 1997, states that "further curriculum modification would not occur during the remaining few weeks....changes in spelling and word prediction would not occur on [one teacher's] part".

14. The complainants requested the following corrective actions:

    a. McGraw Elementary School and District undergo staff development regarding completing an IEP process where all members of the team are equal, fully participating members in the process.

    b. McGraw and District undergo staff development regarding curriculum accommodations and modifications.

    c. The IEPs and overall process at IEP meetings at McGraw be monitored to evaluate compliance with IDEA.

15. The complainants have subsequently withdrawn J.G. from McGraw Elementary School and indicate she will be attending another school within the District. They have requested

reevaluation and a new IEP meeting in which the team was free to share their perspectives and ideas.

16. A letter of agreement was sent from the director of special education to the complainants on August 14, 1997, agreeing to the following to address the concerns spelled out in this complaint:

    a. The District will assure J.G. access to needed technology in the regular education classroom, including access to the word prediction program she has been using. The speech language specialist will work with the regular education teacher and the resource teacher to insure that this technology is not only available, but used. Implementation of this technology access will be monitored by the speech/language specialist and resource teacher, and through parent reporting.

    b. Following a conference with the Assistant Superintendent of Schools and the Director of Pupil Services, a formal plan for professional growth (consisting of at least 15 hours of training) will be developed for the principal of McGraw School. This professional growth will consist of participation in classes, conferences, workshops, or other training activities related to special education process, law, and service delivery. Specific activities will be selected by the principal and approved by the Assistant Superintendent, and documented in the form of a report to be provided to the Assistant Superintendent by May 30, 1998.

    c. Inservice consisting of at least one and a half hours relating to special education process and service delivery will be provided to the teaching staff of McGraw Elementary School during the 1997/98 school year. Additionally, information on professional growth opportunities available in the area related to special education will be provided to the school on a monthly basis. Pupil Services Administration will provide or arrange for the training for McGraw staff.

    d. In reference to the concern related to information sent to the parents of students in the hearing impaired program regarding their opportunity for on-going communication with school personnel, the Direct of Pupil Services will jointly develop a written clarification regarding this issue to be provided to this parent group by September 30, 1997.

    e. Prior to January 15, 1998, sufficient assessments will be completed and a triennial staffing will be held for J.G.. This will include the development of a new IEP.

17. The complainants indicated in a memo dated August 15, 1997 that they agreed with the District's plan for resolution, but requested the following be added:

    a. A timeline be set by which the principal selected improvement activities and the assistant superintendent agreed, specifically October 30, 1997.

    b. Teaching staff include the guidance counselor, as it relates to training.

    c. Information on professional growth opportunities be provided monthly to the teachers in addition to the principal.

    d. A report of attendance at any inservice trainings be sent to the Director of Pupil Services, CDE and the complainants.

18. As a result of a previous complaint filed against the District, the District was ordered to immediately terminate its practice of allowing changes to an IEP to be made other than as part of an IEP meeting. It was also suggested that the District streamline its IEP process to facilitate IEP development in a lesser amount of time.

19. The District is scheduled to be routinely monitored for compliance with the Act, on February 3,4 and 5, 1998.

III. CONCLUSIONS

Based on the District's lack of response to this complaint since receipt on 6/20/97, and on the District's proposed and/or negotiated resolution offered to the complainants, it must be assumed that the allegations made by the complainants are accurate and that the District did violate the law by (1) failing to conduct meetings for the purpose of developing, reviewing and revising J.G.'s IEP, specifically by not granting reasonable requests of the parents for IEP reviews; making unilateral administrative placement decisions, other than within the IEP meeting; and a resource teacher developing part of the IEP unilaterally, other than within the IEP meeting; and (2) by failing to provide access to a computer with word prediction software in the regular education classroom during the 1996-97 school year, as stated on the IEP.

IV. REMEDIAL ACTION

1. On or before 1/15/98, the District must have completed reevaluation of J.G. and held a meeting to consider the evaluation information and develop and new IEP. A copy of that IEP must be forwarded to this office within one week of its development.

2. The District must provide those services listed on J.G.'s current IEP, including needed technology in the regular education program. On or before 9/30/97, the District must provide this office with written assurance that such services are being provided.

3. The District must develop a professional growth plan for the principal at McGraw Elementary, consistent with that proposed to the complainants in the letter dated 8/14/97. On or before 9/30/97, the District must provide this office with a copy of that plan. On or before the end of the 1997/98 school year, the District must provide this office with a report indicating the plan was implemented.

4. On or before 1/1/98, the District must provide technical assistance to its entire special education staff relative to IEP facilitation and development. Such assistance shall emphasize streamlined facilitation to assure IEP development within a reasonable amount of time, and non-acceptance of unilateral modification to IEPs, either by staff or parents. A brief description of that technical assistance shall be forwarded to this office within one week after its implementation.

5. During the regularly scheduled onsite visitation to the District, February 3,4,and 5, 1998, the CDE onsite team will specifically interview the principal and a sampling of school staff to assure (1) IEPs are developed by teams rather than unilaterally, (2) staff's participation in IEP meetings is open rather than influenced by administration, and (3) services and modifications determined to be appropriate by the IEP teams are provided.

V. RECOMMENDATIONS

While this complaints investigator respects and applauds the District's desire to work with parents to reach resolution to concerns and complaints, she also is concerned about the lack of adherence to formal complaint procedures and timelines relative to this case. It is recommended that, in the event of future complaints, responses be given in a timely manner. This would in no way jeopardize the potential for local resolution or complaint withdrawal.

Dated this 19th day of August, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 510

Status: Complaint Decision

Key Topics: FAPE

Issues: Whether services were provided during two school years

Decision: District did provide services. Parent were in disagreement with services.

Discussion: New IEPs were held in abeyance until parent and school reached agreement. Agreement does not need to be reached to complete an IEP.

FEDERAL COMPLAINT NUMBER 97.510

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on July 23, 1997.

B. The complaint was filed by Mr. H.S. and Ms. C.S. on behalf of their son, P.S., against the Brush School District, Mr. John Gotto, Superintendent ("the District"), and against the South Platte Valley Board of Cooperative Educational Services, Dr. William F. Vincze, Executive Director and Ms. Normal Gilmore, Director of Special Education ("the BOCES").

C. The timeline within which to investigate and resolve this complaint expires on September 22, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District and the BOCES as recipients of federal funds under the Act. It is undisputed that the District and the BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. P.S. is a student with disabilities eligible for services from the District and the BOCES under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCES have violated the provisions of the Act by failing to provide a free appropriate public education to P.S. in accordance with his individual educational plans ("IEPs") from 9/27/95 through the end of the 1996-97 school year.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (20), and 1414,

34 C.F.R. 300.2, 300.5, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCES were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and the BOCES, in part, based on the assurances contained within the application.

3. One of the assurances made by the District and the BOCES is that, in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within their jurisdiction to meet the unique needs of that child.

4. P.S. was a preschool student with disabilities as identified on a family service plan dated 9/27/95. That plan indicates that he was to receive 12 hours per week of developmental preschool services and 30-60 minutes per week of speech/language services from September, 1995 through September 1996.

   a. An addendum to the IEP dated 2/2/96, indicates that Paul had been out of school since 1/23/96 due to the absence of a para-professional (deceased). Until a new paraprofessional was hired, P.S. was to receive both social work and speech language services in the home for one hour per week. The original IEP was changed to add 60 minutes per week of counseling services from a psychologist and/or social worker from February, 1996 through September, 1996.

   b. The IEP was reviewed on 9/20/96 and states that P.S. is to receive 12 hours per week of preschool services, 30-60 minutes per week of social work/psychological services and 30-60 minutes per week of speech/language services, for the 1996-97 academic year.

5. H.S. and C.S. in their complaint state that P.S. was admitted to Children's Hospital for a complete pediatric physiological evaluation on 4/11/97 and was discharged on 4/25/97. They allege that:

   a. P.S. received no special education services from 4/25/97 through the remainder of the school year and that

   b. P.S. may not have received any special education services from October, 1995 through April 11, 1996, as evidenced by the schools refusal to provide reports of those services.

Upon contacting C.S. for some clarification regarding the complaint, she stated that she had been instructed by her advocate, Ms. C. "T." A., to answer no questions in this case; rather all questions should be directed to her advocate or to their attorney. Upon contacting the advocate, she stated that her direction was not that strong, but that she (as the advocate) was probably in a better position to answer questions about this case.

6. CDE has received no communication from an attorney regarding this case.

7. The District and the BOCES in their written response to the complaint state that since 1995, P. S. has been enrolled in an all-day preschool until he had a one-on-one aide and three aides quit due to his behavior. They state that P.S. has had a multitude of staff persons working with him, and that he has been given much more time and attention than other students.

8. As part of the investigation of this complaint, the complaints investigator interviewed S.C., the developmental preschool teacher in Brush who served P.S. during the past two school years, T.D., the BOCES psychologist who served P.S. and K.S., the BOCES speech/language specialist who served P.S. Each was interviewed individually. The responses to specific questions and accounting of events and services was the same from all three persons, and was as follows. Records also indicate the following.

    a. P.S. attended preschool 4 days per week, 3 hours per day during each of the last two school years.

    b. During the 1995-96 school year, there were many absences. School personnel were concerned about those absences and worked with personnel from the Department of Social Services to assist the parents in helping P.S. get to school more consistently.

    c. In January, 1996, P.S.'s aide/paraprofessional ("PARA") became deceased and P.S. was placed on interim homebound services (one hour per week of speech/language and psychological services) until another PARA could be found. A new PARA was located and served P.S. throughout the remainder of the school year.

    d. At the beginning of the 1996-67 school year, P.S. had a new PARA, as the previous one had taken another position in the District. Her services discontinued in December as a result of her pregnancy. A new PARA was employed, but stayed only two weeks due to her obtaining another position in the District.

    e. Subsequently C.S., a male PARA, was employed and stayed with P.S. until that time P.S. was admitted into Children's Hospital on April 11. Those interviewed indicated that C.S. had a good relationship with P.S. and with his family.

    f. IEP review meetings were held on 10/3/96 and on 4/8/96 to discuss concerns and P.S.'s lack of progress.

    g. P.S. was admitted to Children's Hospital on 4/11/97 for a complete pediatric physiological evaluation, and discharged on 4/25/97. An IEP meeting was held on 4/25/97 to consider a change in special education programming for P.S. and to review the information from Children's Hospital. At that meeting, Ms. C.S., stated she did not want P.S. to come back to preschool. Rather she wanted homebound services. Although the principal agreed this may be the best option for the remainder of the school year, other service providers did not agree. Based on past experiences when providing services within the home, they felt this was difficult to accomplish and that P.S. really needed a program which provided interaction with and modeling by other students.

It was reported that Children's Hospital recommended placement into a day treatment facility; however none were available within 100 miles of the parents' home. School personnel indicated they were not given access to all information from Children's Hospital; and therefore had limited information upon which to make their decisions about change in placement. C."T."A., the family advocate, reports they were given all the information about P.S., but not about the family.

The IEP team did not reach agreement relative to changing placement. Rather they recommended waiting for more information from Children's, exploring a possible program in Limon, and then reconvening to finalize the decision.

h. The family did not send P.S. back to preschool for the remainder of the year. The PARA, C.S., although by then employed in another evening position, was willing to return as P.S.'s aide, should he return.

9. The IEP meeting was reconvened on 5/9/97 to address concerns, discuss recommendations from Children's Hospital and consider change in placement. Recommendations as a result of that meeting were to: continue to research possible day treatment programs, Social Services to consider options related to safety concerns within the home, and follow-through with additional evaluation as J.F.K. center. No change in placement was recommended.

10. The family and family advocate contacted The Legal Center on 5/20/97, asking for assistance in obtaining educational services for P.S. The Legal Center requested information from the District on 6/10/97. No other information on the Legal Center's involvement is available.

11. Reportedly, the Department of Social Services removed P.S. from the home in June and placed him into Cleo Wallace. However, this decision was reversed; and he was returned to the home. Subsequently, this complaint was filed.

12. An IEP meeting was held on 8/19/97 to review placement for P.S. The team agreed that P.S. should attend a special education class in Brush for 1 and 1/2 hours per day with an aide riding the bus with him to and from school. While there he is to receive speech/language services. After he adjusts to the new medication recommended by Children's Hospital, a review meeting will be held, and hopefully he will then attend kindergarten part of the day.

13. Ms. C.S. was contacted by this complaint's investigator today. She stated that P.S. was doing very well and she was currently happy with his services. She also stated that the issue in April was that she and her husband did not want to send P.S. back to preschool, as they wanted time with him at home. They wanted home services but the school would not agree to this.

14. Ms. C."T."A, the advocate, was also contacted and asked for clarification on the allegations; as the findings do not entirely corroborate with them. She stated that P.S. has attended the developmental preschool for the past two years but that he couldn't have possibly received any services because he was constantly running away and school personnel were chasing him. When asked what the school could have done differently, she stated that they could have found a PARA with whom P.S. bonded and they could have provided services within the home environment. When questioned about the male PARA

with whom, according to staff, both the student and parents interacted well, she stated that was not that case.

She also indicated that since school is now going well for P.S., he should stay there and hopefully his time there will be increased.

III. CONCLUSIONS

The District and the BOCES did not violate the provisions of the Act by failing to provide a FAPE to P.S. in accordance with his IEP from 9/27/95 through 4/11/97. P.S. was provided the preschool, psychological, and speech/language services listed on his IEPs. Issues regarding "bonding with aides" and "time spent chasing him" are to be taken to IEP teams and discussed as a part of appropriate services. Should the parents/advocate have disagreed with the services determined appropriate by the IEP teams, they could have exercised their right to appeal.

Technically, the District and the BOCES did not violate the provisions of the Act by failing to offer a FAPE to P.S. in accordance with his IEP from 4/25/97 through the end of the school year. The previous IEP indicating placement in the development preschool at Brush was still in effect, and no agreement was reached relative to change in that placement. The District was willing to accept P.S. back into that preschool, should the parents have agreed to do so. Again, should the parents/advocate have disagreed with the District's refusal to change his placement, they could have exercised their right to appeal.

The District and the BOCES technically should have indicated, during the IEP reviews on 4/25/97 and 5/9/97, that the current placement is still in effect and that no change in placement has been agreed to. The lack of such statement caused confusion, and parents were unclear as to the next step and their right to appeal. It was not in the best interest of P.S. to have no services from 4/25/97 through the end of the school year.

Clearly, the District, BOCES and the parents are in agreement that current services to P.S. appear to be working and all are in agreement with the current placement and proposed plans for increased services.

IV. REMEDIAL ACTION

None.

V. RECOMMENDATIONS

It is recommended that the BOCES provide information to its IEP facilitators relative to the need for completion of IEPs and non-acceptance of IEPs and/or services held in abeyance until parents and school personnel reach agreement. Agreement may not always be reached; however a plan must be finalized, so that parents may exercise their right to appeal, should they so choose.

Dated this 22nd day of September, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 511

Status:	Complaint Decision
Key Topics:	IEP Suspension and Expulsion Prior Written Notice
Issues:	Whether an IEP meeting was held to determine appropriateness of services and manifestation
Decision:	District did use procedures relative to suspension that were in accordance with the Act.
Discussion:	Communication was poor relative to explaining procedures to parents.

FEDERAL COMPLAINT NUMBER 97.511

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on August 11, 1997.

B. The complaint was filed by Ms. Shiela Buckley, Ms. Loree Vanderhye and Ms. Pat Kail, advocates on behalf of C.K., a student with disabilities at Douglas County High School, who is the son of S.K.

C. The timeline within which to investigate and resolve this complaint was to have expired on October 10, 1997, but was extended twice at the request of the complainants: first to November 21, 1997 and then to December 19, 1997

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.

G C.K. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District utilized procedures relative to suspension and expulsion which violated the provisions of the Act. Specifically did the District:

- fail to hold a meeting to determine (1) whether or not the services currently being provided to C.K. were appropriate and (2) whether or not the misconduct which brought about suspension and potential expulsion was a manifestation of disability.

- fail to arrange such meeting at a mutually agreed on time,
- fail to provide sufficient notice of a proposed change in time of a scheduled meeting, and
- fail to notify parents of C.K. of a significant change in placement (from school to homebound) determined unilaterally by the District without holding an IEP meeting.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.131, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.500, 300.504, 300.505 and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within the application.
3. One of the assurances made by the District is that, in accordance with the Act, it provide a free appropriate public education to each student with a disability according to the individualized education program ("IEP").
4. C.K. is a student with disabilities who, having been accused of vandalism, was suspended from school for ten days from April 28 through May 9 and was considered for expulsion. The following is a chronology of events relative to this matter taken from records, the complaint, the District's response and interviews with the mother (S.K.) and advocates.

Friday, 4/25	Ms. S.K., mother of C.K., received a phone call from the assistant principal at Douglas County High School ("DCHS") informing her of C.K.'s suspension from school for 10 days.
Monday, 4/28	C.K.'s special education case manager talked with Ms. S.K. regarding the suspension. She indicated the need to convene the IEP team and asked Ms. S.K. if she intended to bring an attorney to the meeting. Apparently that decision had not yet been made.
Wednesday, 4/30	The secretary at DCHS called Ms. S.K. to schedule the IEP meeting before 5/9, the last day of C.K.'s allowable suspension of 10 days. The school suggested the dates of 5/6 and 5/7, but these were not agreeable to S.K. S.K suggested 5/5, but this date did not work for the school. May 12th was also discussed as a possible date, but was not selected at that time due to its being one day beyond the ten day allowable suspension. No mutually convenient date was agreed upon.

Wednesday, 4/30	Ms. S.K. contacted three advocates to assit her in this process and also determined it was necessary to retain an attorney.
Thursday, 5/1	Ms. S.K. contacted DCHS to indicate she would be available 5/8, however this was not acceptable to the school. Subsequently, 5/12 was agreed to as it was the earliest date that was convenient for both parties. The District agreed to this date provided Ms. S.K. submitted her agreement in writing, as it did constitute the 11th day of suspension, one day beyond that which is allowabe under the Act.
Thursday, 5/1	Ms. S.K. wrote a letter to the principal indicating May 9th would not be acceptable to her and therefore agreed to hold the meeting on May 12th (which would cause a suspension of 11 days, in excess of the 10 allowed prior to such meeting)
Thursday, 5/1	The District gave written notice of the IEP meeting scheduled for 5/12 at 1:00.
Friday, 5/2	A certified letter was sent from the Superintendent to Mr. and Ms. K., providing written notification of the proposed expulsion. It indicated that since C.K. was enrolled in a special education program, an IEP meeting would be held on Monday, 5/12, to determine whether or not C.K.'s behavior was a manifestation of his disability. The letter stated that if the IEP team determines that his behavior was not a manifestation of disability, the expulsion process would continue and an expulsion hearing would be held on 5/13. It indicated that if the expulsion process was continued, C.K.'s suspension would be continued another 10 days through Friday, 5/23. The letter also indicated that the parents would be contacted regarding home bound support for C.K.'s educational needs.
Thursday, 5/8	The case manager left a voice mail for S.K., inquiring whether they would be bringing an attorney to the 5/12 meeting.
Thursday, 5/8 (after business hours)	Ms. S.K. left a voice mail message that she would be bringing an attorney as well as advocates.
Friday, 5/9	The case manager called Ms. S.K. at work to inform her the IEP meeting had been rescheduled from 1:00 p.m. to 8:00 or 8:15 a.m. as this was the only time the school's attorney could attend. She emphasized that the 1:00 meeting could not be held as the District's attorney could not be present at that time. Ms. S.K. responded that this was not acceptable to her, as her attorney and three advocates had already scheduled 1:00; and one of the advocates was definately not available on that morning. The case manager stated she would look into this matter and get back to Ms. S.K. Because of the scheduling difficulties to this point, the case manager did suggest that the meeting could be held without the parents; however, the parents objected and that objection was honored.

Friday, 5/9 Ms. S.K.'s husband and father of C.K., talked to the case manager who told him someone from the District would be contacting the parents regarding homebound tutoring.

Friday, 5/9 (evening) An administrator from the District's Special Education Services Department called Ms. S.K. to verfy the 8:15 meeing on 5/12. Ms. S.K. stated this was not agreeable to the parents; and the administrator said she would call back as soon as possible with alternative dates. The administrator is emphatic that, during this telephone conversation, she confirmed with Ms. S.K. that the afternoon meeting was concelled. She also discussed the option of providing homebound services; however Ms. S.K. did not agree to this.

Monday, 5/12 Ms. S.K., three advocates and an attorney appeared at DCHS for the 1:00 p.m. meeting, in compliance with the written notice and disregarding the verbal notice of cancellation. The parent's attorney insisted that, since the District had failed to send the parents written notice of cancelation, they were required to be there. The assistant principal and case manager refused to hold the meeting.

Ms. S.K., advocates and attorney then went to the office of the Director of Special Education. They questioned why C.K. was not allowed to return to school this day, since is was the 11th day of suspension, in excess of the allowable 10. The Director and Case Manager were under the impression Ms. S.K. had agreed to homebound services until the IEP meeting was held. That was not the case.

The District, Ms. S.K., advocates and attorney later agreed to hold the IEP meeting on Thursday, 5/15.

Ms. S.K. was informed by voice mail that C.K. would be allowed to return to school the next day, Tuesday, 5/13.

Tuesday, 5/13 C.K. returned to school. The District acknowled that C.K. was out of school for a total of 11 days.

Thursday, 5/15 An IEP meeting was held at DCHS to determine (1) whether the services provided to C.K. were appropriate and (2) whether C.K.'s misconduct was a manifestation of his disability. The IEP meeting was attended by C.K.'s parents, their attorney, three advocates, the case manager, a regular classroom teacher, a school psychologist, a school social worker, a school nurse, principal, assistant principal, two administrative designees from Special Education and the school's attorney. It was determined that:

- C.K.'s placement was no longer appropriate.
- C.K.'s misconduct was a manifestation of his disability and therefore, the expulsion process could not continue.

Another IEP meeting was scheduled for 5/19 to revise C.K.'s IEP.

Monday, 5/19 An IEP meeting was held to revise C.K.'s IEP. Ms. S.K. was in attendance at that meeting

9/16/97 School personnel reported that C.K. wais doing well in school.

5. The complainants (advocates) allege the following regarding these events:

   a. The District failed to comply with the Act by suspending C.K. for 11 days, 1 day more than the allowable 10.

   b. The District tried to impose homebound totoring without parental involvement or consent.

   c. DCHS misrepresented to special education administration, Ms. S.K.'s consent for homebound totoring.

   d. DCHS staff does not have a clear understanding of disabilities.

   e. DCHS staff does not have a clear understanding of their obligtions in dealing with students with disabilities and their parents.

   d. The District had no right to change the time of the IEP meeting based on their need to have their attorney present.

   e. The District threatened an addtional 10 days of suspension.

6. The parent alleged, later in the complaint process that:

   a. Communication regarding C.K.'s failing grades was so late in coming, he stood little chance of recovering them to anything passable; his IEP was not being followed, and one teacher was not aware he had an IEP.

   b. Communication by DCHS personnel was very poor, including:
      - being hung-up on,
      - being threatened that the IEP meeting/manifestation determination would be held without the parents
      - not sufficiently informing the parents of their rights, explaining the suspension/expusion process, or informing parents of their options

7. The District, in its response to the complaint, alleges that:

   a. The parent group was rude and confrontational when arriving for the 5/12 afternoon meeting which was cancelled.

   b. The parent group's actions were intended to strong arm the District into convening an IEP meeting without its attorney.

   c. The parents responded in an unusually emotional manner which ultimately and negatively impacted the ability of the parents to work in a collaborative and cooperative manner with District personnel.

   d. One of the advocates was loud, overbearing, often interrupted other speakers, made accusatory statements, challenged the competency of the District staff, spoke to the disability in generalities rather than specific to this child, was inapproporite, insulting, adversarial and unprofessional.

8. The complainants, having read the District's response to this complaint, allege their demeanor as advocates was incorrectly portrayed by the District. As a result, a meeting with this complaints investigatr to discuss the situation was held on 11/10/97. Also, this complaints investigator was requested to listen to an 2+hour audio tape of the 5/15 IEP meeting, which she has done.

9. The District, in its response to the complaint, indicated that (as a result of this complaint) it has initiated in-service training for its special services and building administrators which addresses the procedural and substantive requirements for disciplining students with disabilities; and that approprite DCHS administrators have attended this training.

D. DISCUSSION

1. The central issue in this complaint does not appear to focus on specific violations of the Act nor on District procedures. Rather it appears to be one of poor communication.

   a. The District did hold a meeting to determine (1) whether or not the services currently being provided to C.K. were appropriate and (2) whether or not the misconduct which brought about suspension and potential expulsion was a manifestation of disability. That meeting was held on May 15th and it was determined that services provided to C.K. were not appropriate and that his misconduct was a manifestation of his disability. Expulsion proceedings were, therefore, terminated.

   b. The District did try to arrange the IEP meeting at a mutually agreed on date and time. The District had suggested 5/6 and 5/7 and 5/9 but these were not agreeable to the parents. The parents suggested 5/5 and later 5/8, but these were not agreeable to the District. Subsequently both agreed to 5/12 at 1:00. Later, the District indicated this time was not agreeable to them and suggested an earlier time. This was not agreeable to the parents. Ultimately the meeting was held on 5/15, a mutually agreeable time and date.

   c. Because the IEP meeting had to be scheduled within a short timeline, sometime between 4/28 and 5/9, communication regarding the date and time had to have been done verbally. The District contacted the parents on 5/1; however the dates of 5/5,6,7,8 and 9 were not acceptable to one of the parties, and the meeting was scheduled for 5/12. Written notification was provided on 5/1. Eight days later, the District notified the parent that the time was not agreeable, as their attorney could not attend at that time; and the time was changed to that morning. Ms. S.K indicated the time change was not aggreeable and the meeting was not scheduled. Certainly less than one working day's notice of a proposed time change was not sufficient for Ms. S.K.; however the District did not hold the meeting, based on this time not being agreeable.

   d. The District did not change C.K.'s placement from school to homebound, but rather suspended him for 10 days which is allowable. When a mutually agreed upon time and date could not be arranged within those 10 days, the District offered to provide homeboud services to C.K. This was declined by the parent, and was not provided. There obviously was not clear communication between DCHS staff and special education administration regarding this issue.

2. The District did suspend C.K. for 11 days, 1 day more than the allowable 10. However significant effort was made to schedule an IEP meeting within the 10 days and no mutually agreeable date could be found until the 11th day. This was agreed to by the parents, as indicated in written correspondence. Subsequently, when the time on the 12th was not agreed to, and the meeting was rescheduled for the 15th, the District allowed C.K. to return to school. A suspension on 11 days, in this situation, would not constitute a change in placement nor a failure to provide a free appropriate public education ("FAPE").

3. Communication was undoubtedly poor regarding this issue.

   a. The 5/2 letter from the Superintendent to the parents, notifying them of the proposed expulsion was not clear. It states: "Since [C.] is enrolled in a special education program, a staffing is scheduled...where it will be determined if [C.'s] actions were a manifestation of his handicapping condition. If the findings of the hearing are such that C.'s actions were not a manifestation....C. be expelled..." "In the event the expulsion process will continue and in order to allow time to convene the hearing, I am extending [C.'s] suspension an additional ten days..." "The hearing is scheduled for Tuesday, May 13..." "Due to the scheduling requirements for the hearings, you will be contacted regarding Home Bound support for [C.'s] educational needs." Such language did not clearly indicate that an IEP meeting would be held so that the IEP team, of which the parents were a part, could determine manifestation; it spoke to the findings of the hearing which is really an IEP meeting. It indicated that an additonal 10 days suspension would occur to allow for a hearing, although the hearing was scheduled for the 12th day which would only necessitate an extra two days and the relationship to manifestation determination was not clear. It usesd "handicapping condition" rather than "disability" which may also be confusing.

   Ms. S.K. was clearly confused when contacting this office and when contacting advocates. She did not understand IEP meeting vs. hearing, who would be a part of that, how it would be determined, and if there were any rights to appeal. She did not understand the reason for the second suspension for 10 days. She also did not understand the reason for home-bound support. It would appear that there was no asttempt by the staff at DCHS to clarify any of this information.

   Had the IEP team determined the misconcuct was not a manifestation of disability and expulsion proceeding continued, it cannot be assumed that home-bound services would be the avenue through which special education would be provided. That decision is up to the IEP team, not central administration.

   b. Although the mutuallly agreed to time and date of the IEP meeting was settled on 5/1 and written notification was provided on 5/1, the District did not change the time from 1:00 p.m. to 8:00 a.m on 5/12. This hardly would be sufficient time for the parents to make alternative arrangements for themselves as well as with three advocates and an attorney. Also the parents were not asked if this change in time were agreeable, but rather were simply informed. When they indicated they could not agree to that change it was suggested the meeting be held without them. This suggestion could hardly be considered helpful, given the parental concern and attempt to find an agreeable date up to this point. The parents, regarding this matter, were intitially asked on 4/28 if they were brining an attorney; and although they retained an attorney on 4/30, did noot inform the district of such until they were asked again on 5/8. Earlier communication of their intent would have alleviated much of the frustration.

Although Ms. S.K. had informed the case manager early in the day that the change in time was not acceptable, this information did not get conveyed to special education administration; since a special education administrator called that evening to verify the change in time with the parents.

c. The case manager and the special education administrator both informed the parents on 5/9 that the meeting would not be held at 1:00 on 5/12, as originally planned, due to the District's attorney not being able to attend at that time. Nevertheless, the parents, advocates and attorney appeared for that meeting. This group stated that they assumed the meeting would be held, since no written notification of cancellation was received. Certainly with all the short time lines, various verbal communication regarding scheduling of this meeting, and no legal requirement for written notification of cancellation, appearing at that time was not a positive step indicating communication and cooperative, collaberative effort. Such behavior was perceived as being rude and confrontational with an attempt to strong-arm the District.

d. The District and the parents both have the right to hold IEP meetings at mutually agreeable times and places, and to invite "other" persons to attend the meetings as they deem appropriate. The District has the right to have its attorney present, as does the parent. To call on a Friday to change the time of a Monday meeting from afternoon to morning could hardly be conducive to good communication, however. Also, it would have been more helpful if the District had asked the parent if this change were possible, rather than simply stating the time change and suggesting the parent need not be there, if this were inconvenient.

e. Although the complainants' perception is that the District threatened an additional 10 days of suspension, the District simply was not clear in its letter as to how the additional suspension would relate to manifestation determination and perhaps, expulsion.

f. Communication to parents regarding a child's failing grades is a matter of local responsibility and not a part of this complaint process. However one would hope that such communication would occur in time for the parents to take action or to request the IEP team to reconvene to discuss the situation. All teachers of students with disabilities must be informed of the modicfications and accommodations listed on IEPs.

g. For the District to suggest that parents were not able to work in a collaborative and cooperative manner due to their unusual emotional response, was not helpful. It would appear that any parent, upon learning of misconduct of their child and proposed expulsion, might be emotional. Providing helpful information about the process and alternatives may have assisted the parents in being less emotional.

h. Having listened to the audio tape of the 5/15 IEP meeting, this complaints investigator was not able to understand the District's assertion that one of the advocates was "loud, overbearing, interruptive, inappropriate, insulting, adversarial and unprofessional". She did speak to the disability syndrome in general and related how this may be the situation for C.K. Questions were asked of her, and on one occassion she asked the team if she might read a particular statement from another person with the same syndrome, before reading it. Such accusations regardless of accuracy, do not assist with the developement of a collaborative/ cooperative working relationship; and only further the feelings of distrust and poor communication.

III. CONCLUSION

The District did not utillize procedures relative to suspension and expulsion which violated the provisions of the Act. Specifically the District did not:

- fail to hold a meeting to determine (1) whether or not the services currently being provided to C.K. were appropriate and (2) whether or not the misconduct which brought about suspension and potential expulsion was a manifestation of disability.
- fail to arrange such meeting at a mutually agreed on time,
- fail to notify parents of C.K. of a significant change in placement (from school to homebound) determined unilaterally by the District without holding an IEP meeting.

The District did fail to provide sufficient notice of a proposed change in time of a scheduled meeting; however that meeting was not held due to the time not being agreeable to the parents.

IV. REMEDIAL ACTION

None.

V. RECOMMENDATION

Clearly, poor communication was the issue in this complaint. DCHS staff need to either more clearly understand suspension/expulsion procedures or, if understood, communicate them in a manner in which the parents understand. The District did , in its response to the complaint, indicate that (as a result of this complaint) it has initiated in-service training for its special services and building administrators which addresses the procedural and substantive requirements for disciplining students with disabilities; and that approprite DCHS administrators have attended this training. The District is encouraged to continue the provision of this training and include ideas on improved communication.

Dated this 19th day of December, 1997

Carol Amon, Federal Complaints Investigator

Case Number: 97. 512

Status: Complaint Decision

Key Topics: Schools of Choice
Extended School Year
IEP

Issues: enrollment in a summer reading program

Decision: School of choice – no violation
District of residence--violation by not provided that which was listed on IEP.

Discussion: District agreed to something which child didn't qualify for and couldn't participate in; but did not reconvene IEP team to offer alternative.

FEDERAL COMPLAINT NUMBER 97.~~510~~ 512

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on August 27, 1997.

B. The complaint was filed by Mr. D.W. and Ms. H.W., parents, and Ms. R.C., child and family advocate with the ARC of Denver, on behalf of M.W., against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education ("the District") and against the Rocky Mountain School of Expeditionary Learning ("RMSEL"), Mr. Rob Stein, Director.

C. The timeline within which to investigate and resolve this complaint expires on October 27, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The RMSEL is a public school of choice offered cooperatively by Cherry Creek, Denver, Douglas County and Littleton Public School Districts ("sponsoring districts").

F. The sponsoring districts established the Rocky Mountain School of Expeditionary Learning Board of Cooperative Educational Services ("BOARD") to oversee the administration of RMSEL. The BOARD states in its intergovernmental agreement that it will comply with all applicable state and federal laws. For each pupil attending the RMSEL, the school district of residence pays to the RMSEL an amount equal to 100 percent of the school district of residence's per pupil operating revenues ("PPOR"). To the extent allowed by law, other state and federal funds that are paid to the sponsoring districts to serve pupils attending the RMSEL also will follow the pupil to the school.

H. The complaint was brought against the District, directly, and the RMSEL, indirectly, as recipients of federal funds under the Act. It is undisputed that the District is a program participant and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act. The District then, contractually turns over its responsibility to provide FAPE to RMSEL.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

J. M.W. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and RMSEL have violated the provisions of the Act by:

- failing to enroll M.W. in the District's summer reading program, specifically the "Summer Literacy Program" as listed as a special consideration on her 4/15/97 IEP and by
- unilaterally adding eight modifications to that IEP and stating that M.W. isn't eligible for the District's summer reading program, without providing notice or reconvening the IEP team.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(16), (17), (18) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.131, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.505, and 300.533

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within the application and, pursuant to contract, those funds were transferred to the RMSEL,
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child. Contractually, the District turned over its responsibility for the provision of FAPE to M.W., to RMSEL. Should RMSEL not meet its contractual agreement, responsibility would then return to the District.
4. According to the District, funding for the RMSEL presumes that the RMSEL will provide the typical range of educational services needed by its students. However, the RMSEL does not offer the full range of special education and related services that could be offered on an IEP. When it is determined that a student is eligible for more intensive services than are available at the RMSEL, parents are advised that such a continuum would be available at the student's home school or other appropriate placement within the District. The District does provide speech/language, occupational/physical therapy, and other related services to RMSEL students whose parents transport them to a District campus to receive those services. Such services are gratuitous and not directly controlled by an IEP, as the recipient students are neither registered nor counted as District students.

5. M.W. is a student with learning, speech/language and physical disabilities at identified on an IEP dated 4/15/97 which reflected a triennial review. Recommended placement in the least restrictive environment was the regular classroom with consult services. Special considerations included: assistive technology consult, reviewing and monitoring of transportation services, and enrollment in the District's Summer Reading Program. Extended School Year ("ESY") services were not recommended.

The IEP team consisted of M.W.'s parents, parent advocates, a general educator and a special educator from the RMSEL, a social worker and coordinator from the District's Child Find Program (utilized when assessments which are needed are not available via existing RMSEL staff), and a District physical therapist.

According to the District, at the conclusion of that meeting, the parents and the RMSEL special education teacher agreed to schedule subsequent meetings to review and plan specific adaptations and objectives. Subsequently H.W., M.W.'s mother, and the special education teacher from RMSEL met on 4/30/97 and eight additional accommodations and IEP objectives were collectively defined.

An addendum to the IEP completed by the District's Child Find Social Worker indicates: "The family has chosen to have M.W. attend RMSEL and understands that special education services can be provided only on a a consultive basis as identified on the IEP. If she were attending her home public school she would be eligible to receive: LD services 60 minutes per day, 5 times per week; S/L services 30 minutes per day, 2 times per week and OT/PT services 120 minutes per day, 1 time per month. The addendum also indicates M.W. currently receives S/L and OT services 30 minutes per week, each.

5. The complainants allege that when ESY was discussed, it was presented that, although M.W. experiences regression over the summer and has trouble recouping her skills without services over the summer, she would not benefit from the ESY that the District provides but that it might be more appropriate for her to attend the District's Summer Literacy Program. They allege this was agreed to and written into the IEP as a "consideration".

Subsequently, Ms. H.W. was informed by the District that M.W. wasn't eligible for the summer reading program, as she was not a student enrolled within the District.

H.W. alleges that M.W. was dually enrolled in both RMSEL and the District by virtue of the fact that her IEP meetings are attended and facilitated by District personnel and she receives her related therapies at District sites by District therapists. The complainants allege that non-provision of the summer reading program was a violation of the Act, as this decision was made unilaterally without reconvening the IEP team. They specifically allege that this unilateral change to the IEP was made by the RMSEL special education teacher, who allegedly also added eight modifications to the IEP without reconvening the IEP team. As a result, the complainants allege the parents should have been informed of their procedural right to appeal these decisions, but were not.

6. The District, in its response to the complaint, states:

Upon investigation, the IEP committee learned that students attending RMSEL are not eligible for the District Summer Literacy Program. The RMSEL special education teacher verbally related this to the parents on 5/20/97 and added a statement via general addendum to the IEP that RMSEL students do not qualify for the District Summer Reading Program, therefore M.W. is not eligible for that program.

The eight additional accommodations to M.W.'s IEP were not unilaterally added. The RMSEL special education teacher and Ms. H.W., M.W.'s mother, met on April 30, 1997, and discussed and drafted the accommodations together. In fact, M.W.'s mother specifically requested that several of the accommodations be added to the IEP.

7. There is nothing in the records to indicate that parents were provided with written notice of the change in placement/services, nor is there anything to indicate the IEP team was reconvened.

8. Clearly, M.W. has an IEP which indicates she was to be enrolled in the District Summer Reading Program. This was one of three "special considerations" listed on the IEP. "Special Considerations" are not part of the required content of IEPs under the Act; however an analysis of items listed would suggest these are similar to "related services" and must be considered as such.

9. The District has responsibility for the development of IEPs and the provision of FAPE to students with disabilities within its jurisdiction. Although the District does not count RMSEL students for PPOR funds, it does so for funding under the Act, then contractually turns this funding over to RMSEL in exchange for RMSEL's taking responsibility for the provision of special education services. Those services are limited. Should RMSEL not provide those services listed on the IEP, they would be breaking a contractual agreement with the District; however the District, who has the responsibility to provide FAPE under the Act, is then held accountable for the provision of such services. This is not a jurisdiction issue, but rather a contractual issue. RMSEL is not responsible under the Act; the District is. (Please note that RMSEL would be responsible for meeting the requirements of Section 504 of the Rehabilitative Act of 1975.)

10. The District clearly met its responsibility to develop an IEP for M.W. and the IEP recommended services for M.W. which were in excess of those provided by RMSEL. As a school of choice, RMSEL is not required to establish and offer any particular program if such program is not currently offered in that school.

11. The parents, knowingly chose to enroll M.W. in RMSEL, accepting the limited special education consultative service. The triennial review held 4/15/97 was developed by both the District and RMSEL, knowing the parent's continued choice for RMSEL. Both RMSEL and District staff agreed to the provision of the District's Summer Reading Program. Such service must be considered a related service, and not an extended school year service for which M.W. did not qualify, according to the IEP.

12. When the District administrators informed the IEP team (consisting of both District and RMSEL staff) that M.W. did not qualify for the summer reading program, it was incumbent upon RMSEL (contractually) and the District (jurisdictionally) to reconvene the IEP team to reconsider services, given these technically could not be provided. (Had M.W. qualified for such services had she been counted by the District for PPOR funds, RMSEL could have contracted back with the District to provide such services.) Because of the unique relationship between the District and RMSEL, the District cannot be held responsible for services for which the student did not qualify. However, upon learning this and knowing that this technical disapproval would constitute a change in placement/services for the summer, it was the responsibility of RMSEL, and ultimately, the District, to reconvene the IEP team. This was not done.

13. The RMSEL special education teacher and/or the District child find social worker, did not unilaterally change the IEP by removing this "special consideration", but rather, simply recorded on the IEP, the non-qualification information they had received. Although the complainants allege that the 8 modifications were unilaterally developed, records indicate that these modifications were positive in nature, did not constitute a change in placement, and were, in part requested by the parents.

III. CONCLUSIONS

1. The RMSEL did not violate any provisions of the Act, as RMSEL is not directly responsible for the Act. Rather, the District holds that responsibility and contractually gives that responsibility to RMSEL in exchange for funding.

2. The District did violate the provisions of the Act by not providing the summer reading program listed on the IEP. Upon learning of M.W.'s not qualifying for this particular program, the IEP team should have been reconvened to determine substitute services. Not providing those services constituted a "change in placement", thus the IEP team should have been reconvened to reconsider services.

3. The District did not violate the provisions of the Act by unilaterally adding eight modifications to the IEP and stating ineligibility for the summer reading program. Technically, IEPs can only be developed by IEP teams; however there is some indication that the IEP team agreed to the parents and teacher meeting to determine further accommodations. The recording of ineligibility was simply recording information, not unilaterally changing the IEP.

IV. REMEDIAL ACTION

On or before January 1, 1998, the IEP team for M.W. must be reconvened to determine what services should be provided to M.W. to compensate for those summer reading program services that were not provided. Such services must then have been provided by the beginning of the next school year. While the District is responsible for this, according to the Act, it is highly suggested that RMSEL be involved as a result of its contractual obligations with the District.

A copy of the results of the above IEP meeting must be forwarded to this office no later than two weeks after its development.

Dated this 27th day of October, 1997

Carol J. Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 513

Status: Complaint Decision

Key Topics:
IEP
Modifications
FAPE

Issues:
Services during first two weeks of school
English teacher's attitude relative to modifications

Decision:
Technical violation of no services during first two weeks
Training and monitoring needed of English Teacher

Discussion: Difficult to determine precisely what modifications were and were not provided. Perceptions very disparate.

FEDERAL COMPLAINT NUMBER 97.513

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), September 9, 1997.

B. The complaint was filed by Mr. M.S. and Ms. M.S. on behalf of their daughter, J.S., against the Garfield 16 School District, Mr. Steve McKee, Superintendent, and the Mountain Board of Cooperative Services, Mr. Steven M.. Jones, Executive Director and Ms. Becky Minnis, Director of Special Education ("the BOCES"). Ms. Bonnie Soman, West Side Director of Special Education at the Glenwood Springs satellite office, was the respondent to this complaint.

C. The timeline within which to investigate and resolve this complaint expired on November 10, 1997, but was extended indefinitely to allow for a meeting with all the parties to negotiate a resolution to this matter and to allow for a time period during which the negotiated resolution, as a result of that meeting, could be implemented and evaluated.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District and the BOCES as recipients of federal funds under the Act. It is undisputed that the District and the BOCES are program participants and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

J. J.S. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District and BOCES;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; a meeting with the complainants and District/BOCES personnel to understand the issues and come to joint resolution, and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District and the BOCES have violated the provisions of the Act, by:

- failing to provide 4 hours per week of resource room services and 1 hour of resource consultive services from the beginning of the 1996-97 school year until 11/27/96,

- failing to provide 5 hours per week of resource room services and 2 hours of resource consultive services from 11/27/96 through the end of the first quarter,

- failing to provide 5 hours per week of resource room services and 2 hours of resource consultive services from the beginning of the 1997-98 school year to date and

- failing to provide those modifications listed on the IEP as necessary for Jasmine to participate in the 7th grade English class.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) and (20 and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.350 and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District and the BOCES were receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District and BOCES, in part, based on the assurances contained within the application.

3. One of the assurances made by the District and the BOCES is that in accordance with the Act, they will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.S. was identified as a student with perceptual/communicative disabilities on an IEP dated 11/5/95, which resulted from a triennial review. Among those services listed on that IEP were 4 hours a week on one-one-one special education small group instruction in the resource room for language, study skills, problem solving, and content reading, which was to begin on 11/15/95 and continue for one year, which included the beginning of the 1996-97 school year.

5. An annual review was held on 11/26/96. Services listed included 4-5 hours of special education in the resource room for support of math and written language skills which was to have included 2 hours per week of indirect service and 5 hours per week of direct instruction outside the general classroom. That IEP also states that the following

600

modifications must be provided to allow J.S. to participate in the general education program: use of AlphaSmart alternative to handwriting when J.S. chooses, allow shorter assignments, allow extra wait-time for verbal responses, preferential seating-front-right ear toward teacher, and follow recommendations provided by CSU.

6. The complainants allege the following:

   a. The school district failed to implement the IEP during the 1st quarter of the 1996-97 school year (clarified in telephone conversation subsequent to receiving complaint).

   b. The school district failed to provide both special education and regular education modifications during the beginning of the 1997-98 school year.

   c. Ms. M.R., J.S.'s 7th grade English teacher, refuses to implement J.S.'s IEP.

7. The BOCES, in its response to the complaint, states the following:

   a. Special education resource services were provided to J.S. for 50 minutes per day, from the beginning of the 1996-97 school year and that consultation took place in a variety of ways. Consultation was for 1/2 hour per week, not 2 hours, which was a misconception attributed to poor quality Xeroxing.

   b. At the beginning of the 1997-98 school year, the District had difficulty securing a certified/licensed special education teacher; therefore J.S.'s direct special education services didn't begin until 9/8/97.

   c. The special education consultant met with the English teacher at the beginning of the school year to review modifications. Modifications including preferential seating, copying from the board, and having a quiet place to go, have been in place since 9/4/97.

8. The complainants, having reviewed the BOCES response, state that even if the awareness of J.S.'s needs and attempt to provide modifications began on 9/2/97, this was 14 days after school started and these 14 days were difficult for J.S. They also state that their real issue is not with the special education service providers, but rather with the regular education teachers who decide if and when they will provide modifications to students with disabilities.

9. Due to the strong feelings of the complainants which differed from the BOCES response, this complaint investigator decided it might be most productive to meet together with all the parties. A meeting was held on November 13, 1997, which included the principal, the consulting special education teacher, a new special education teacher, the English teacher, the West side Director of Special Education, the complainants and others. An IEP meeting which included these same persons, had been held the day before this meeting. The discussion during the meeting included a review of the outcome of the IEP meeting and a review of the allegations in this complaint and discussion as to how this could be resolved. It was acknowledged by all the IEP meeting was a true planning meeting in which the regular education teachers actively participated, which was a change from previous IEP meetings. It was also acknowledged that the attitude relative to special and regular education was changing in the building and that, rather than being seen as separate and divided, they are now working together.

It became very clear during the meeting that the principal and special education teachers were very much aware of the mandates of the Act, were strongly in support of the services to be provided to J.S., communicated well with the complainants, and basically all agreed to what needed to happen for J.S. It was also clear that the English teacher did not understand (or perhaps did not agree with) the mandates of the Act and did not have the confidence, desire or support to make the necessary accommodations. She expressed feelings of intimidation and defensiveness relative to this complaint. The complainants expressed great trust for the new principal and new special education teacher (as well as the consulting special education teacher) and believed special education services would improve greatly as a result of these new personnel. A plan was designed by the principal, to support the English teacher in making necessary modifications; and the principal assured that the plan would be monitored carefully. All participants at the meeting, except perhaps for the English teacher, appeared comfortable with that plan and expressed positive feelings about the outcome of the meeting. This complaints investigator believed a positive resolution was achieved and that communication and services would greatly improve.

10. Several weeks after the meeting, this complaints investigator was contacted by Mr. M.S., one of the complainants, who stated that all was well except in the case of the English teacher, who was continuing to refuse to provide the necessary modifications. He stated that he had filed a complaint with the U.S. Office of Education, Office of Civil Rights, regarding this matter.

III. CONCLUSIONS

Although the District and the BOCES may have technically violated the provisions of the Act by failing to provide special education services during the first two weeks of school, such violation, although not in the best interests of a student with disabilities, would not constitute a failure to provide a free appropriate public education. It is also apparent that with the change in building administration and special education provider, the commitment to appropriate special education services is strong. The attitude toward special education is positive, inservice training has been provided, and the building administrator has a strong commitment to resolving this issue.

It is very difficult to determine precisely when the English teacher has and has not provided the modifications listed on the IEP; however it was easily observable that there was a strong difference of opinion between the English teacher and others, as to the need for these modifications and whether or not they were being provided. The principal has a strong plan of action to deal with this situation.

IV. REMEDIAL ACTION

On or before July 1, 1998, the principal (with the assistance of the BOCES) must provide to this office a brief written description of the progress made during the year relative to regular education teachers' (and specifically the English teacher's) taking responsibility for the provision of modifications listed on students IEPs.

Dated this 26th day of January, 1998

Carol Amon, Federal Complaints Investigator

Case Number: 97. 514_

Status: Complaint Decision

Key Topics:
IEP
FAPE
Transition

Issues: Transition Plans and Services

Decision: District did Plan and Provide Services

Discussion: Issues of attitude and trust, could have better been resolved through mediation

FEDERAL COMPLAINT NUMBER 97.514

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 2, 1997.

B. The complaint was filed by Ms. J.B., an advocate with the ARC of Denver, on behalf of J.L., son of J.L. and T.L., against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent, and Ms. Patrice Hall, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint expired on December 1, 1997; was extended to December 29, 1997, to allow for the complainant's response to the District response; and again extended to January 26, 1998, to allow for analysis of the complainant's lengthy response which was received on December 22, 1997.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 *et seq.*, ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

J. J.L. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to develop a specific transition plan for J.L., who would have turned 16 prior to the next review, as part of the IEP developed on 3/17/94,
- failing to develop a specific transition plan for J.L. on 3/17/95,
- failing to develop a complete transition plan for J.L. on 3/15/96,
- failing to provide specific transition services and activities during the 1994-95, 1995-96, 1996-97 school years.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), 1412 (2) (B), (4), (6) and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.131, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.346, 300.347 and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within the application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. J.L. was identified as a student with emotional disabilities, on an individualized education plan ("IEP") dated 3/17/94. J.L.'s birthdate is 7/5/78, making him 15 years of age at the time this IEP was developed; with the anticipation of turning 16 during the period covered by this IEP.
5. According to the Act, J.L.'s IEP (at the time he turned 16) must include the following:

   a. a statement of the needed transition services
      i. a coordinated set of activities designed within an outcome-oriented process
      ii. activities must promote movement from school to post-school activities
      iii. activities based on the individual student's needs, preferences and interests
      iv. activities in the areas of:
         - instruction

- community experiences
- development of employment and other post school adult living objectives
- if appropriate, acquisition of daily living skills and functional vocational evaluation

b. if appropriate, a statement of each public agency's responsibilities or linkages, or both, before the student leaves the school setting,

or

c. if transition services are not needed, a statement to that effect and the basis upon which the determination was made.

6 The complainant alleges that no transition plan was developed for J.L. until 2/97, resulting from Ms. T.L.'s demanding one in the fall of 1996. The complainant also alleges that this plan did not include all those items required. In addition, the complainant alleges that J.L. was denied transition services for three years (1994-95, 95-96, and 96-97); and as a result the complainant is requesting compensatory services in the form of tuition and accommodations for three years at a school of J.L.'s choice.

7. A review of J.L.'s records indicate the following relative to transition planning and services:

3/17/94 IEP
explore community resources
improve social skills
increase time for improved decision making
regular diploma anticipated
360 minutes per day of self contained special education instruction
Transition Status: Involvement in community experiences
Goal: Participation in community services/activities
Objective:
    complete 1 community service project every 6 week session
    identify in notebook 2 community agencies appropriate for emancipation per week

3/17/95 IEP
Parent notification dated 3/2/95 indicates that "Joe is invited to attend. Please do."
wants to be a math & science teacher at this time
looking forward to going to a university
special education consultation 10 minutes per day
Goals: continue to take harder classes and get As in classes
    continue to develop relationships with peers
    improve vocational education/career goals
Objectives:
    continue to plan for a math career in teaching
    explore catalogs with information from our college counseling center
    use the computer programs on universities to find out what schools will best serve his needs
    take the "Today's Students Tomorrow's Teachers" course

3/15/96 IEP
Student Notification of Transition/IEP meeting dated 3/4/96
a regular education diploma anticipated
Investigate career options offered through the school
Goal: improve post-secondary options which concerns time of graduation.

Objectives:
- work on a satisfactory educational plan at G.W. which may include attending an extra year
- explore college options by using G.W.'s college office and computer programs

interested in education; possibly a math teacher
10 minutes of special education instruction per week
continues to work at Hugh M Woods... enjoys... was told to apply for a promotion.
Objectives:
- continue to work after school and continue at current success rate
- seek resolution to his health problems which cause him to miss classes/school

2/11/97 Final Transition Plan
(first meeting was 11/22/96, final meeting 2/11/97,
Ms. T.L.'s and J.L.'s signatures indicate they attended these meetings)

Vocational goal: competitive, attend instate college
Residential goal: independent living
Recreation Leisure: Explorer Scouts, camping, hiking, write music, draw, write stories
Goals: attend G.W. one more year, graduate spring 1998
- gain college information through college counselors and on own
- prepare for SAT and ACT tests
- take (above) with modifications if needed
- set timeline
- improve self advocacy skills
- explore career options
- improve social and peer relationships

Financial, Transportation, Medical Care, Legal, Social, Behavioral, Communication, Rehab.Engineering needs were addressed and activities identified
Community recreation/leisure options to be explored with therapist and abuse counselor
Referred to Vocational Rehab in 1996-97 by H.S. Sp Ed Counselor - P.G., Dept of Voc. Rehab identified as responsible
Career Exploration, Interest Inventory to be facilitated by special education counselor at G.W.

3/17/97 IEP
investigate career options offered through the school
improve voc. ed. goals which include time of graduation.
needs to take the SAT and ACT tests
wants to attend college
needs to explore careers
needs post secondary options
needs to get voc. rehab application in
attend high school one more year

4/11/97 Social Work Report
He entered G.W. in 8/94 in grade 10 after having spent 1.5 years in residence at Denver Children's Home where his placement into the E.D. program had occurred.... He feels he did well his first two years in high school, but did poorly last year due to his own adjustment problems and is doing poorly this year due to problems in getting his medication stabilized....He experiences periodic episodes of severe depression which results in his being unable to attend to his school work and sleeping possibly 16 to 18 hours a day. He is not seen as a behavior problem at school and he expresses no conflicts with any of his teachers or his schedule.

4/15- 25/97 IEP (triennial review)

J.L. received student notification of meeting on 3/18/97
A very comprehensive IEP, which includes the following pertinent information

Has completed 170 credits with a GPA of 3.24

J. has bipolar disease that effects his ability to use his potential to attend classes, complete classes and enter into post secondary

...wants to attend college in 1998 after completing an additional year of high school in order to increase his independent life skills, explore aptitude and explore secondary options. J. is experiencing difficulty in the areas of social interaction, organizational skills, self advocacy skills, coping with changes and transitions.

Take the ACT with modifications and complete vocational assessment

Includes a comprehensive list of accommodations and modifications to be provided including:

J. will not be penalized for absences due to his bipolar disease or due to the side effects of his medications

tutoring will be provided to cover the material missed

beginning fall 1997 the counseling office will help Joe identify post secondary educational opportunities and resources that can meet and accommodate the needs of his disabilities. In addition, the counselor will help J. identify aptitude, develop time lines, and improve decision making and organizational skills.

J.'s Transition plan will be reviewed fall, 1997

8. The District's response to the complaint and the complainant's response to the District's response indicate the following:

District's Response	**Complainant's Response to District**
Re: spring 1994 and 1994-95 Upon referral for special education, after having been admitted to Denver Children's Home "Shelter Program", assessment indicated J. was within the superior range for academic and verbal potential and he was achieving at an expected level in terms of academic performance. The consensus of the IEP team was that J. would need an education program to help him deal with the emotional problems in his personal life that occasionally affected his ability to attend and actively participate in school. Transition services, goals and objectives were identified on the 3/17/94 IEP.	Disagree with importance of intellectual potential and academic achievement. He was referred for emotional issues interfering with learning. No transition plan was developed. No out-come oriented process that promotes movement to post-school activities, including postsecondary education, vocational training, integrated employment. No objectives or goals relative to the development of employment. No transition specialist assigned. No representative from the Division of Vocational Rehabilitation ("DVR"). J.L. did not receive notice of

	transition meeting. Nothing addressed the issue of J.'s returning to public school
J. entered G.W. High School as a 10th grade student and his official student transcript reflects that 62.5 carnagie units transferred from Denver Children's Home toward his high school diploma. J. received services from two special education teachers (one replacing the other) and had a successful transition.	Did not receive special education services. Resource class was a study hall with no supports.
Transition services, goals and objectives were identified on the 3/17/95 IEP. J. articulated his goal to attend college and to eventually teach Math and Science. J. continued to achieve at an expected level in terms of academic performance. His transcripts reflect that he maintained an approximate 4.0 grade point average for the 10th grade.	No transition services, goals and objectives were identified that include instruction, related services, or the development of employment. No transition specialist was present. No representative from DVR Agree that J.'s goal was to attend college and to teach. Objectives may relate to this goal but there is no means of instruction. Exploring harder courses, college catalogs, and computer programs on colleges does not provide any instruction. No objectives addressing any support J. needed.
One transition activity was the "resource" room or general study hall...to give J. a structured opportunity to practice and eventually internalize organizational skills. It facilitated an opportunity for J. to organize and begin to define or anticipate a timeline for daily, weekly or long term academic assignments, social or community activities and his employment schedule.	Study hall never provided J. the opportunity to learn organizational skills. J. never received any instruction on how to organize and develop timelines.
Special education teacher had six in-depth conferences with J. in which they discussed peer relationships, academic or personal goals, grades, transcripts, educational requirements for secondary and post secondary education a J.'s transition from DCH to G.W. and his return home.	

Re: 1995-96

In the 11th grade he enrolled in increasingly more challenging courses and continued to maintain a cumulative grade point average of 3.64 and 3.36.	
Transition services goals, and objectives were identified on the 3/15/96 IEP.	This was the first time there was any mention of a transition plan. There was no discussion involving community resources. Plan was not sufficiently developed. No transition specialist, no representative from DVR. Someone who had knowledge about the process and transition to college should have been invited. Because there had been no transition plan or services, J. decided to attend an additional year in high school. J. stated that his education was lacking due to his time at Denver Children's Home and that he had concerns that he was not ready for college. He hoped that he could get the assistance he needed to prepare for college and learn the skills to be successful, during the additional year.
During the second semester, teachers noticed an increase in the number of days that J. was absent. In addition, it was becoming increasingly more difficult for J. to organize his work. At the time of the IEP meeting, Ms. T.L. reported, and J.L. confirmed, that he had stopped taking all psychotropic medication. Thus objectives specific to attendance and organizational skills were identified.	Physician took J. off medication, but later placed him back on medication (by 3/16/96).
J. was enrolled in the "Today's Students, Tomorrow's Teachers" program, designed for high school students who were considering a career in education. J. attended the program and served an internship at an elementary school.	J. did attend.
The special education teacher kept in close communication with Ms. L. and met with J. eight times for in-depth conferences (dates listed). They	The meetings were mandatory and not scheduled to provide transition services.

discussed academic and personal goals, grades, transcripts, his health, organizational skills and strategies, his employment outside of school and educational requirements for secondary and post secondary education.	
During the 3/14/916 IEP meeting, the DPS Post Secondary Enrollment Program, including program guidelines and the enrollment timeline, were discussed. J. was informed that he met the eligibility criteria and was assured support with the application process. J. stated his preference to continue his studies at GW for 1996-97.	This discussion was not held.
Special Education teacher delivered a copy of the SAT study materials to J. and reviewed them with him. In 11/96 [97], J. reported he had misplaced them.	Materials were not received and reviewed. Only an application was received. Because of J.'s disability, special education teacher should have monitored this more closely.
Re: 1996-97	
Ms. T.L. reported in 9/96 that, while J. was back on medication, the physician was having a difficult time in determining the appropriate dosage.	J.'s problems were partially due to the apparent hostile environment at G.W. High School.
A specific transition plan (separate from the IEP) was developed on 11/22/96 and 2/11/97. Although it was anticipated that J. would earn enough academic credits to graduate in June, 1997, the team discussed educational entitlements through age 21.	Ms. T.L. had to request a transition plan, something she had learned about in a college class. Meeting was held on 11/22/96, but she did not get a copy until 1/97. Ms. L. was called on the evening of 2/11/97 to finalize the plan. Team did not meet.
Beginning 1/97, staff observed a number of changes in J.'s school behavior, including increased absences, apparent disorientation and significant difficulty in academic performance. Ms. T.L. reported that often when she would arrive home from work she would find that J. had not gotten out of bed all day or that he was still asleep; on occasion he seemed to require as much as 16 hours of sleep. J.'s private therapist confirmed that J. had frequent or ongoing manic episodes which impacted his relationships with peers and adults and his academic	

performance. He confirmed that the physician was having a difficult time in determining the appropriate dosage of psychotropic medication and until those issues were resolved, J. would have manic or depressive episodes.	
A triennial review was scheduled for 3/15/97 and rescheduled for 4/15/97 at the request of Ms. L. At that meeting, Ms. L. and J. requested informal mediation to resolve issues regarding accommodations. The IEP team reconvened on 4/25/97 and resolved the issues regarding accommodations and completed the IEP.	No triennial was scheduled for 3/15/97. Ms. L. called school to see if one was scheduled and they were not aware a triennial was due. She insisted one be held. DPS staff was so hostile toward J. and his mother's request for accommodations, Ms. L. requested they stop the meeting. She requested mediation. No specific objectives were discussed at the triennial.
Special education teachers kept in close communication with Ms. L. and met with J. for seven in-depth conferences. (dates and topics of conversation listed)	Communication and conferences did not occur.
Special education teacher met with J. in the counseling office to review university and college materials. She helped him locate copies of brochures and access information on the Internet. J. left with copies of information to review at home with his parent. Ms. L. was notified of the date and time of this activity so that she could anticipate that this information was available for review.	Review did not occur. J. was given catalogs to review on his own. This was so overwhelming that he hid them at home. Internet access did not occur, as he dislikes computers. Ms. L. did not receive notification.
On 11/27/96, P.G., with Vocational Rehabilitation Services, met and interviewed J. and gave him an application for VR services. Ms. L. was notified by telephone than an intake interview had been completed that that J had an application which needed to be filled out and returned.	Interview and notification did not take place. Ms. P.T. states she has never interviewed J., that J. should have had some transitioning services year ago.
On 12/2/96 J. was given a copy of SAT study materials and parent was notified of such.	SAT study materials never received and no notification was given.
On 1/30/97 special education teacher contacted both J. and his mother concerning PSAT workshops.	Contact did not occur.

In the Spring of 1997, special education teacher and J. completed the SAT and ACT application and request for adaptations, given they had not been completed in the past.	Did not occur.
On 3/l14/97, special education teacher and J. completed a choice of study sheet.	Did not occur.
In 3/97, special education teacher provided J. with a second application for VR and an application for SSI. She also gave Ms. L. a copy of the application and P.G.'s phone number, recommending she contact Ms. P.G. with any questions.	Special education teacher should have assisted J. and answered any questions about DVR's process and services.
In the spring of 1997, the special education teacher contacted J. and his mother and offered to transport J. to and from the University of Denver's open house for their day program which is designed to serve post secondary students with identified disabilities. Ms. L. refused.	J. was not interested in attending a program designed to serve students with disabilities, but rather a regular college with accommodations.
Re: 1997-98 The special education teacher helped J. register for courses at G.W. There were many absences during the first 6 weeks. Beginning 10/1/97, J. stopped attending school altogether. The special education teacher left messages inquiring about his health and his intent to return to school. The phone messages were not returned. A meeting was scheduled on 9/25/97, at the request of the complainant/ advocate and was held, but neither J. nor his mother attended (neither canceled or suggested another time). A meeting was held on 10/30/97 which included school personnel, J., his mother, and J.'s private therapist. J. stated his intention to graduate in June, 1998, and requested homebound services for the remainder of the school year. The committee agreed that homebound services would include Spanish and French language instruction and would facilitate ongoing transition objectives, activities and services.	Absences related to disability and lack of support from school J. stopped attending school at the order of his physician. No messages were received. J. was depressed about returning to DPS and having a repeat of the problems from the year before. He was not receiving any of the accommodations that were a part of the 4/97 IEP. Transition services were discussed and J. would be contacted to arrange visits to different community colleges in order for him to take classes in the spring of 1998. Homebound tutoring in Spanish and French has not been consistent. J. did visit the Community College of Denver and is in the process of registering for

Spring 1998. Complainants strongly believe that the homebound services and transitional services would not have been provided if complainants had not filed this complaint.

9. An analysis of these two responses clearly indicates that there is a vast difference in perception of events and that in many cases responses absolutely contradict each other. Because of this, this complaints investigator contacted the complainant and suggested a meeting of all the parties. The purpose of such meeting was to have been to deal with each allegation and response, step-by-step, and try to determine the reason for the different perceptions or contradictory responses. The complainant did not want to participate in such a meeting and was willing for this complaints investigator to resolve this complaint based on documentation.

10. The complaint process is not one in which testimony is taken under oath and a judgment made as to whose testimony is more credible. Rather, conclusions must be drawn based on written documentation. The following seems apparent.

    a. J.L. has had current IEPs from the time he was placed into special education to the present.

    b. Although a specific separate transition plan with all the components required by law was not begun until 2/11/97 (at age 18), transition needs, goals, objectives and services were written as part of his IEPs beginning 3/17/94. It was stated from the beginning that a regular diploma was anticipated.

    c. Beginning 3/17/95 (at age 16), it was stated that J.L.'s career goal was to attend college and become a math or science teacher. It was undisputed that J.L. had the intellectual ability to accomplish that goal, and regular education classes were taken to support that goal. Transition services began relative to that goal. Although the complainant states that the plan didn't address vocational training or integrated employment, there would have been no need for this, recognizing J.L.'s goal to get a regular diploma and go on to become a teacher. The complainant also objects to not having a transition specialist assigned, but one would question the purpose of that with J.L's goals. She also objects to not having a representative from DVR, but again, students make plans to go on to college without the early assistance of someone from DVR.

       The complainant agrees that J.L.'s goal was to attend college and to teach, but objects to the fact that there was no instruction relative to his goal. Regular education instruction leading to a diploma would constitute that instruction.

    d. J.L.'s desire to attend G.W. High School for an extra year was noted, and the request was granted by the District as noted in the IEP.

    e. When J.L.'s attendance dropped, the IEP indicated the need to seek resolution to his health problems which cause him to miss school.

    f. A social work report states that J.L. feels he did well his first two years in high school, but did poorly the third and fourth years due to his own adjustment problems and problems in getting his medication stabilized. J.L. expressed no conflicts with any of his teachers or his schedule. The complainant alleges that J.L.'s problems were due to a hostile environment at G.W. Without a meeting of all parties to understand this difference, the complaint investigator is not able to make a determination relative to this matter.

g. J.L. experienced difficulty in the areas of social interaction, organizational skills, self advocacy skills and coping with changes and transitions. Goals and objectives were written relative to this and the District contends services were provided; however the complainant denies that any such services were provided. Without a meeting of all parties to understand this difference, the complaint investigator is not able to make a determination relative to this matter.

h. The District did give a DVR application to J.L. on 3/97, along with the phone number of the person to contact if there were questions. The complainant alleges that the special education teacher should have assisted with the application, not the parent, and the special education teacher should have answered questions about DVR. Transition services are not the sole responsibility of the school district, but rather the law strongly indicates that responsibilities lie with the parents, the school and with other agencies. The complainant's allegation has no basis.

i. When homebound services were requested by J.L. for the remainder of the 1997-98 school year, the District agreed to this. The District agreed to include instruction in Spanish and French and facilitate ongoing transition objectives, activities and services. The complainant alleges that these services are not consistent.

III. CONCLUSIONS

1. The District did not violate the provisions of the Act by failing to develop a transition plan for J.L. on 3/17/94, 3/17/95 and 3/15/96. Although there is no document specifically labeled "transition plan" most of the needed components, in this case, were developed as part of the IEPs . Those components which are technically missing would not have altered J.L.'s services. A specific transition plan, meeting all requirements, was begun on 11/22/96 and relates to J.L.'s last two years of high school. J.L.'s transitioning from high school graduation to college is in progress.

2. The District did not violate the provisions of the Act by failing to provide transition services during the 1994-95, 95-96 and 96-97 school years. Special education, related and some transition services have been provided by the District since the time J.L was eligible. In addition, J.L. has received and is receiving regular education services leading to a regular diploma (as documented by his transcripts) which facilitates his college entrance.

3. The complainant's request for compensatory services in the form of tuition and accommodations for three years at a school of J.L.'s choice is denied. J.L. has acquired and is acquiring credits which will lead to a regular diploma, needed for his career goal of a college education.

IV. REMEDIAL ACTION

Although there were no definite violations of the law, there is some concern that J.L. is not receiving consistent homebound services at this time. Therefore, the District is required to submit to this office a copy of J.L.'s final transcript leading to a regular education diploma, within one month of the termination of this school year.

V. RECOMMENDATIONS

The number of hours that has been spent in the filing, responding to and investigation of this complaint is enormous; and it has taken nearly four months for resolution. It is this investigator's opinion that these differences in perception and opinion could have been much more easily resolved, should this dispute have been referred for mediation. Mediation is a quick, voluntary process which leads to a mutually agreeable resolution among all the parties resulting in a "win-win" agreement. Should agreement not be reached, the complaint process and/or due process hearings are still available. Many of these allegations related to "attitude" and "distrust" which can be addressed in mediation, but not in the complaint process. In the future, the advocacy organization representing parents, may want to consider mediation.

Also, disputes as to the content of IEPs are best resolved by requesting a new IEP meeting and/or by appealing the decision of the IEP team. A due process hearing officer would then be able to take testimony under oath and rule relative to witness credibility.

Dated this 1st day of January, 1998

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 515

Status: Complaint Decision

Key Topics:
- IEP
- FAPE
- Transition
- Related Services
- Assistive Technology
- Transportation
- Behavior Plan

Issues: Clarity of amount and type of services

Decision: District did plan and did provide services. Clarity of Transition Plan in Question

Discussion: Plan need to be written to the level of specificity that is clear to all

FEDERAL COMPLAINT NUMBER 97.515

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 6, 1997.

B. The complaint was filed by Ms. R.C., an advocate with the ARC of Denver, on behalf R.R., grandson of Ms. F.C., against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent, and Ms. Patrice Hall, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint expired on December 5, 1997; was extended to January 26, 1998, to allow for a meeting of all involved individuals and analysis of the results of that meeting.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

J. R.R. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- failing to hold an annual review of R.R.'s individualized education program ("IEP") on or before June 6, 1997,

- failing to provide appropriate assistive technology in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter,

- failing to provide speech language/language services in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter,

- failing to provide transportation services in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter,

- failing to evaluate behavior, develop a behavioral support plan and provide behavior supports as part of the 1994-95 IEP and thereafter,

- failing to provide supplementary aids and services, including occupational therapy, to allow R.R. to benefit from education, beginning May 31, 1994, and

- failing to provide needed transition services to allow R.R. to participate in post-secondary academic options.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), 1412 (2) (B), (4), (6) and 1414,

34 C.F.R. 300.2, 300.5, 300.6, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.18,300.121, 300.130, 300.131, 300.180, 300.235, 300.300, 300.340, 300.343, 300.344, 300.345, 300.346, 300.347 and 300.350, 300.532 and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.
2. The funds were paid to the District, in part, based on the assurances contained within the application.
3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.
4. R.R. was identified as a student with emotional disabilities.

5. The complainants allegations and the District's response to those allegations follows, along with the findings of this investigation, based on a meeting with all the parties and documentation provided.

a. failing to hold an annual review of R.R.'s individualized education program ("IEP") on or before June 6, 1997:

COMPLAINANTS	DISTRICT
last IEP was 6/6/96	was held at the King Soopers Reclamation Center at 9:30 a.m. on 5/23/97. R.R. and Ms. Cooper attended, provided input, expressed satisfaction and signed as present

The District did hold a review 5/23/97. A student notification of transition/IEP meeting was sent on 5/10/97, as was a parent notification. An IEP dated 5/23/97 is on file; and R.R.'s and Ms. F.C.'s signature indicate attendance. Apparently Ms. F.C. was at that meeting up through the development of goals, but then left. Ms. F.C. states she never received written notice of the meeting, even though records indicate it was mailed.

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b. failing to provide appropriate assistive technology in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter:

COMPLAINANTS	DISTRICT
R.R. has not been able to use his communication equipment because his mobility equipment hasn't been adapted to support the communication device.	5/94 IEP addressed assistive technology: finger spelling and an alphabet board as part of homebound instruction. 3/9/95 recommended for SLI 5/95 IEP Transition team referred him to Childrens' Hospital for an evaluation to address his computer skills and use of a communication device. Acknowledged that R.R. used the alphabet board very proficiently, but used finger spelling more slowly. Childrens' evaluation completed 8/1/95. Recommended LightWRITER, Zlyco wheelchair mount, carrying case, cable assembly to computer for backup. Children's obtained funding through Medicaid and equipment was purchased. Training on use of equipment was made available through Childrens'. Childrens' also recommended that finger spelling and

alphabet board continue.

12/95 and 4/96 meeting with Children's staff to support R.R.'s use of the LightWRITER in various community settings.

R.R. received weekly sessions with a speech/language pathologist from Children's

Therapy sessions, funded by Medicaid and Scottish Rite Foundation, have continued from the 1996 IEP to the present.

If the LightWRITER was not available, due to reprogramming or mount repair, R.R. used light technology systems which were reported as very fast and accurate.

R.R. has had access to both light technology as well as high technology in order to consistently provide him with a method to communicate. Though there have been sporadic difficulties with the high technology devices, R.R. has always had an effective means of communication available through light technology systems. These have continually been reported to be efficient, effective and R.R.'s preferred methods of communication.

Wheatridge Regional Center has begun to meet R.R.'s assistive technology needs because nothing is being done by DPS.

Role of DPS' SLI is to facilitate and coordinate transition services. The Wheatridge Regional Center and Children's Hospital are resources which have been utilized for R.R. through the efforts of, and in collaboration with, the DPS.

The LightWRITER equipment often breaks down, as do the supports which allow it to be utilized with R.R.'s wheel chair. There is not a quick system in place for repair, having taken 2 months on one occasion. When this happens R.R. uses his letter board and sign language, as well as some speech which he is learning.

Funding for the repairs is often the issue. Ms. F.C. agreed to make the initial contact for repair. If Medicaid will not pay for the currently needed repair, Vocational Rehabilitation will be contacted. If that fails the District will assume responsibility.

Ms. F.C. had hoped for loaner equipment that could be utilized when R.R.'s was broken, however this is not practical due to the lengthy time it takes to program the system specifically for him.

c. failing to provide speech language/language services in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter:

COMPLAINANTS	DISTRICT
R.R. was to receive speech, but has not, causing his grandmother/guardian to pay for private speech services.	1994-95 and 95-96 IEPs did not list speech/language as a service. R.R. did receive s/l support in clinical settings and through the services of a DPS homebound teacher who was recruited and hired specifically because she was dually certified in special education and speech/language. The 6/6/96 IEP reflects that Children's weekly speech/language sessions were received as a result of a referral made by the District Transition Team. Services were provided in community settings and were funded by Medicaid, and focused on educating R.R. in his use of the LightWRITER. At the 1997-98 IEP meeting, it was determined that R.R. did not have a speech/language disability. However, speech/language services have remained uninterrupted since he left Mediplex in 1995.

There appears to be a difference in perception as to what constitutes speech/language services. While the District provides training in functional language skills throughout its entire program, Ms. F.C. wants specific instruction in the formation of sounds. Also, although group speech/language instruction was provided, Ms. F.C. does not believe this is adequate as compared with individual therapy. Although instruction in speech/language is being provided, there is a need for much greater clarity as to the specificity of services.

d. failing to provide transportation services in accordance with his 1994-95 IEP, his 1995-96 IEP, his 6/6/96 IEP and thereafter:

COMPLAINANTS	DISTRICT
DPS refused to provide aide to ride with R.R. to support positive behavior;	1994-95 homebound services, not requiring transportation

therefore Access-a-Ride would not transport him.	Transportation for scheduled trips within his neighborhood was provided by SLI staff using their personal automobiles. 1995-96 R.R. was provided with community experiences and transported by SLI staff in their personal automobiles. While at King Soopers, he was transported in personal automobiles. After approval for ACCESS-a-RIDE, R.R. was able to travel independently; however, this company was unreliable. Therefore, staff again drove him in their private vehicles.
DPS would only provide transportation one way, stating that R.R. lived too far away for support staff to travel.	R.R. was suspend six times (one day each) for sexually inappropriate behavior on Access-a-Ride. Also he was suspended for 2 weeks due to behavioral problems which endangered the safety of the driver. During these suspensions, private vehicles were utilized. Ultimately it was decided that SLI would provide transportation from host home to worksite in personal vehicles and host homes would provide return. When R.R. moved to a new host home in 8/97, SLI staff assumed sole responsibility for transportation

It appears there were some communication problems between R.R.'s host home care giver and the transition team, relating to transportation. Again, it appears that transportation services need to be more specifically defined so that all have the same understanding of what is to be provided.

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e. failing to evaluate behavior, develop a behavioral support plan and provide behavior supports as part of the 1994-95 IEP and thereafter:

COMPLAINANTS	DISTRICT
No behavioral evaluation or behavioral support plan. DPS did not provide behavior supports during hours of school service; but cites behavioral problems as the reason R.R. cannot attend academic classes	A behavior plan was developed by Mediplex staff in 6/93. This was replaced and updated 5/94. SLI staff implemented this plan. ON 1/97 a referral was made to a behavioral consultant, who subsequently met with R.R. once a week for 10 weeks. Payment was shared. He advised the SLI

staff regarding behavior intervention techniques which were then implemented.

The behavioral expertise and skills the SLI staff possess, in conjunction with the behavior plans developed by consulting specialists, have supported R.R. in the management of his behaviors.

The concern relates to the quality of the behavior plan and the quality of services provided by the consultant, to which Ms. F.C. had originally agreed. R.R. needs a behavior plan which stresses consistency in all environments. One needs to be developed with the support of the District's behavioral specialist.

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f. failing to provide supplementary aids and services, including occupational therapy, to allow R.R. to benefit from education, beginning May 31, 1994:

COMPLAINANTS	DISTRICT
There is no OT despite that being one of R.R.'s more significant needs	Beginning 1994-95 and thereafter, IEP teams determined that OT was not necessary as a related service. Outside agencies also did not believe R.R. needed or could profit from OT

Whether or not a particular service, such as OT, is needed, is to be determined by an IEP team. If Ms. F.C. does not agree with the decision of the team, she may exercise her right to appeal.

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g. failing to provide needed transition services to allow R.R. to participate in post-secondary academic options:

COMPLAINANTS	DISTRICT
DPS Supported Living Institute has failed to develop or implement academic opportunities in a post secondary situation	R.R. and Ms. Cooper were counseled regarding a variety of settings including CCD, Emily Griffith Opportunity School, Technical Education Center, Auraria Community College Campus and GED programming and have been given the names of resource people and their phone numbers. It appears that it is Ms. Cooper who has not proceeded with the process nor followed up on the information provided. On 9/16/97, Ms. Cooper agreed to an educational evaluation to consider pursuing a GED. This was arranged, however Ms. Cooper canceled this and would not reschedule.

Ms. F.C. was not clear about the information regarding the various settings. She strongly wants to delay educational evaluation until R.R. has his LightWRITER system with which to communicate. Again, the transition plan/IEP needs to be much more specific relative to the how the implementation of academic opportunities will occur.

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h. **Additional alleged violation:**

COMPLAINANTS	DISTRICT
DPS staff stated to Ms. F.C. that DPS was no longer responsible to provide education for R.R. when his residence moved out of the district	R.R. moved to a respite foster home, not a group home, outside of Denver County. Therefore DPS was no longer responsible. DPS agreed that R.R. could continuous the DPS job training site, but that transportation would have to be re-arranged. If R.R. was to move back to DPS, they would reinstitute services. When DPS was informed of R.R.'s plans to say with Ms. Cooper from 11/17 -21, SLI staff transported him

The District must provide services to R.R. when he resides within its jurisdiction, but not when he is in a foster home outside of the district.

6. IDEA regulations Question #51 in Appendix C to Part 300 state that the amount of time to be committed to each of the various services to be provided must be stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

7. The following was obvious to this complaints investigator while meeting with all the parties:

   a. Ms. F.C. is a strong advocate for R.R. and want what's best for him.

   b. The District has provided, in cooperation with many agencies, high quality special education and related services.

   c. There has been both a communication breakdown, and a need for more specificity in the IEP so that all those involved will have the same understanding as to what specific services will be provided and who is responsible.

   d. There was no attempt by the complainant or her advocate to resolve these differences by contacting the District's Director of Special Education. The service coordinator that works closely with R.R. was not at all aware of any concerns on the part of the complainant.

III. CONCLUSIONS

1. The District did not violate the provisions of the Act. It did not fail to hold an annual review, fail to provide assistive technology, speech-language or transportation services, fail to evaluate behavior, develop a behavioral support plan and provide behavior supports, and it did not fail to provide supplementary aids and services, including occupational therapy. Rather there were many differing perceptions of how and by whom these services were to be provided.

2. The District did not write the transition plan/IEP is such a manner that the amount and type of services to be provided were clear to all who are involved in both the development and implementation of the IEP.

IV. REMEDIAL ACTION

As quickly as possible, but by no later than February 15, 1998, the District must hold an annual review to write the transition plan/IEP to a level of specificity that is clear to all. Such plan must address behavior and assistive technology needs and services. A copy of that plan/IEP must be forwarded to this office no later than 2 weeks after its development.

V. RECOMMENDATIONS

It is this investigator's opinion that the differences in perception and opinion among the parties could have been much more easily resolved, should this dispute have been referred initially to the District's Director of Special Education or referred to this office for mediation. Mediation is a quick, voluntary process which leads to a mutually agreeable resolution among all the parties resulting in a "win-win" agreement. Positive communication is stressed. Many of the allegations in this complaint related to poor communication and or lack of specificity which could have easily been addressed by the Director or through the mediation process, rather than the complaint process.

Also, disputes as to the content of IEPs are best resolved by requesting a new IEP meeting and/or by appealing the decision of the IEP team. A due process hearing officer would then be able to take testimony under oath and rule relative to witness credibility. This is not available through the complaint process.

Dated this 26th day of January, 1998

Carol Amon, Federal Complaints Investigator

Case Number: 97. 516

Status: Complaint Decision

Key Topics:
IEP
FAPE
Paraprofessional

Issues: one-on-one PARA assistance

Decision: District provided one-on-one assistance with by means of a group of 8 persons. Parents expected one person. FAPE was provided

Discussion: IEP must be clearer relative to the meaning of one-on-one assistance

FEDERAL COMPLAINT NUMBER 97.516

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 7, 1997.

B. The complaint was filed by Mr. A.H. and Ms. R.H. on behalf of their son, L.H., against the Denver Public Schools, Dr. Irv Moskowitz, Superintendent and Ms. Patrice Hall, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint was to have expired on December 8, 1997, but was extended by three days to December 11, to allow for additional time to conduct interviews.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.

J. L.H. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide one-on-one assistance as an adaptation stated on [redacted]s current individualized education program ("IEP") dated 1/8/97.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), 1412 (2) (B), (4), (6) and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.131, 300.180, 300.235, 300.300, 300.340, 300.346, 300.350 and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within the application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. L.H. is identified as a student with physical, speech/language and emotional disabilities on an IEP dated 1/8/97. That IEP states that L.H. is to be in the adaptive/functional program which includes some regular education classes when beneficial for him. Special education services specified were:
    - 270 minutes per day, five times per week of self contained special education relative to physical disability and emotional disability
    - 45 minutes per day, three time per week of itinerant speech/language services
    - 90 minutes per day, five times per week of general education.

    The IEP does not list any specific services of a paraprofessional.

    Accommodations and Modifications include:
    - **one-on-one assistance**
    - use of calculator
    - use of computer or word processor
    - regular communication via "back and forth book"
    - monthly meetings between teacher and parents.

5. Mr. and Ms. H., the complainants allege that "one-on-one assistance" means L.H. is to have a one-on-one paraprofessional ("PARA") and that this has not been provided since he transferred from Merrill Middle School to South High School, beginning 9/2/97.

6. The District, in its response to the complaint, states that PARAs are not assigned to individual students, but rather to schools, programs or classrooms. According to the District, L.H. has received one-on-one assistance as needed since 9/2/97 from any of eight individuals, including 3 special education teachers, 2 general education teachers, 2 PARAs and 1 speech/language specialist.

7. The law is clear that those services, accommodations and modifications listed on the IEP must be provided. The amount of time to be committed to each of the various services or accommodations must be appropriate to that specific service and must be stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP. Changes in the amount of service cannot be made without holding another IEP meeting.

8. The issue at hand in this complaint, is the interpretation of "one-on-one assistance" and the amount of that assistance.

a. According to the complainants, "one-on-one assistance" for the past four years has meant a PARA primarily assigned to L.H. Evidence of this interpretation includes the following:

- The triennial review dated 1/16/96 states that L.H. has a one-on-one PARA who remains with him throughout the day to provide him with the support and cues he needs to be successful in school,
- PARAs signatures of attendance on IEPs,
- Two sets of interview questions utilized by persons, including Mr. A.H., to conduct interviews for L.H.'s PARA,
- Records of one male PARA assigned to L.H. at Fairmont Elementary,
- Records of one male and one female PARA assigned to L.H. at Merrill Middle School,
- A social work report dated 1/18/96 talking about L.H.'s own individual PARA and L.H.'s adjusting to a new PARA.

The complainants state that this interpretation continued for the 1/8/97 IEP meeting and that there was no discussion relative to removing the one-on-one PARA. In fact, according to the complainants, a one-on-one PARA was assigned to L.H. at Merrill Middle School based on the 1/8/97 IEP, and the complainants were involved in the interview for that position. The complainants also allege that upon determination of L.H.'s going to South High School, his previous and current special education teachers stated they were working with central special education administration to obtain L.H.'s PARA.

According to the complainants, they were advised that interviews for the PARA position would be conducted on October 24 and they could be a part of that interview process. However one-half hour before the scheduled interviews, they were informed by the special education teacher that the sector manager for special education:

(1) disallowed the parents' participation in the interviews and
(2) stated that the PARA hired would not be allocated to L.H. on a one-to-one basis, but would be an addition to classroom staff.

The complainants allege that the sector manager's interpretation of L.H.'s IEP was a new interpretation which constituted a unilateral change without due process.

According to the complainants, the special education teacher later informed them that D.S. had been hired to begin serving as L.H.'s PARA on October 29, 1997.

b. The District, in its response to the complaint, states that during the course of the school day, L.H. receives individual assistance from any of eight individuals. When he attends any classes outside of the special education classroom, one or two PARAs attend the class with him to provide additional support, as needed. The special education teacher maintains close communication with the parents through telephone contact and the "back and forth book"; and L.H. regularly participates in and completes the expected academic, vocational and community work activities.

9. Telephone interviews were conducted with the four IEP committee members present at the 1/8/97 IEP meeting, in addition to the parents. Each was asked what was meant by "one-on-one assistance" when discussed at the meeting. The following interpretation was provided:

L.H. had always had his own PARA, who was primarily assigned to him, but also utilized to assist others. Parents had always been involved in the hiring (selection) of that PARA, mostly at the father's request, as this was not District policy. There was no discussion at the IEP meeting that there would be a change from L.H.'s having a PARA primarily assigned to him. One difference was in the way this was to be worded on the IEP. Staff had been instructed by central administration to not write on anyone's IEP that they would have their own personal PARA, but rather they would receive one-on-one assistance.

All four members present believed that an extra PARA was to be employed to assist in the program/classroom where L.H. attended. When L.H. was scheduled to leave the program at Merrill (subsequently transferred to Kunsmiller Middle School), one PARA position would no longer be required within that program. They also believed that the program into which L.H. was moving (South High School) would need to employ an extra PARA. There was discussion that one of the PARAs at Merrill was interested in moving to South, as a result of this.

The committee members acknowledged they were hoping that L.H. would be able to function at the high school with less one-on-one support, but that would come later. They expected him to receive the same one-on-one support initially at the high school (in the fall) that he received at Merrill from January through May. The extra PARA at Merrill (who attended the January IEP meeting) considered herself to be L.H.'s PARA.

10. Telephone interviews were conducted with service providers at South High School. Their interpretation of events is as follows.

Initially it is believed that there was a breakdown in communication between central administration and the program staff at South relative to the hiring of an extra PARA. While staff members assumed a PARA would be hired for L.H. (which allowed for L.H.'s parents to be part of the interview), central administration stated that the position would be a program position... that, although the PARA would be primarily assigned to L.H., the PARA would not be considered a personal PARA. Thus the parents were not to be part of the interview process.

Initially L.H. was provided one-on-one assistance by the teachers and two PARAs at South, until the time that the additional PARA was hired on October 29, 1997. Service providers stated that, although the program did not have an extra PARA from September 2 to October 29, L.H. was provided one-on-one assistance any time he needed it. When the extra PARA was employed and added to the program, all service providers referred to that PARA as "L.H.'s PARA". The PARA considers himself to be "L.H.'s PARA" and spends most of his time with L.H. According to program staff, L.H. needs a lot of one-to-one support in order to keep him busy, as he has a tendancy to drift off; and his primary PARA provides that assistance. When staff was informed that Mr. A.H. was concerned that his son was not getting the support he needed, due to his not having a PARA assigned specifically to him, their reactions were that of disbelief and non-understanding. They stated emphatically that L.H. has his own PARA, is doing very well, and parents indicate to them they are quite pleased with the program. They even indicated that Mr. A.H. was allowed to be part of the interview process prior to this PARA's employment.

11. After hearing from program staff that L.H. essentially had his own PARA and that Mr. A.H. was even part of the interview process, this complaints investigator contacted Mr. A.H. to further understand his concern. He emphatically stated that L.H. "does not have his own PARA", that "when a list of people is responsible for one-on-one assistance, no one is responsible" and that "if something goes wrong with [L.H.], it's because the PARA is off with someone else".

    Mr. A.H. suggested that staff members in central administration have not told the truth relative to district policy regarding personal PARAs, have a pattern on not telling the truth and that it was his hope that this complaint investigation would speak to that. Mr. A.H. was informed that the complaints process does not allow for taking testimony under oath and rendering a decision as to whose testimony is credible. Rather the focus is on the provision of services listed on the IEP.

12. The subject of this complaint is whether or not the District failed (and continues to fail) to provide one-on-one assistance to L.H. as an adaptation stated on his current IEP(dated 1/8/97), from the beginning of this school year to the present time. The task then is to (1) determine what was meant by one-on-one assistance and (2) determine if that has been and is being provided.

    "One-on-one assistance - interpretation": The complainants clearly believe this means a PARA assigned specifically to L.H. The four District employees present at the IEP meeting in which this was determined, believed this to mean a PARA primarily assigned to L.H. but who may assist others in the program. The IEP lists "one-on-one assistance" as an accommodation, but does not list any specific individual who is to provide this. While the IEP does not list the services of a PARA, the interpretation of the entire IEP committee would strongly suggest that a PARA primarily assigned to L.H. was intended. Also the fact that L.H. had a PARA primarily assigned to him from January through May would suggest that the same service would be expected from September until the date of the next IEP review.

    "One-on-one assistance - provision of service": The complainants state that one-on-one assistance is quite different from having a PARA specifically assigned to L.H. District central administration states that one-one-one assistance if being provided by a group of individuals. Program representatives state that one-on-one assistance has been provided by all staff and that beginning October 29, 1997, L.H. has had his own PARA. Therefore L.H. did not receive the assistance of a PARA primarily assigned to him from September 2 to October 29; however he did receive one-on-one assistance.

    Although the parents believe it is their right to sit in on the interview process when hiring a PARA who is to work with L.H., this is an administrative decision and not a parental right. Having been asked to participate in that process in the past would not mean that administration in required to continue that process. Whether or not the District has a policy on this and whether or not representatives told the truth about this policy is not relevant to this complaint.

III. CONCLUSION

Although the District may have technically failed to provide a PARA primarily assigned to L.H. from September 2 to October 29 (which was the interpretation of "one-on-one assistance" held by all members of the IEP team), it did provide one-on-one assistance from a group of eight different persons until that time when an additional PARA was employed to work primarily with L.H. Such technical failure would not constitute a failure to provide a free appropriate public education to L.H.

IV. REMEDIAL ACTION

The District must reconsider the need for one-on-one assistance for L.H. at his next regularly scheduled annual review which must be held prior to 1/8/98. Such assistance should be clearly defined in the IEP and all options must be considered, including the use of a PARA primarily assigned to L.H. The District may not limit what may be written into an IEP relative to this issue, but rather must state the specific service in such a manner that it is clear to all who are involved in both the development and implementation of the IEP. Should the parents then disagree with the determination, they may execute their right to appeal.

Dated this 11th day of December, 1997

____
Carol Amon, Federal Complaints Investigator

Case Number: 97. 517_

Status: Complaint Decision

Key Topics: FAPE
Related Services

Issues: Provision of speech/language services

Decision: District did provide that which was indicated on IEP

Discussion: Parent wanted more services

FEDERAL COMPLAINT NUMBER 97.517

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 13, 1997.

B. The complaint was filed by Ms. T.M. on behalf of her son, S.M. against Jefferson County Schools, Dr. Jane Hammond, Superintendent, and Ms. Kay Cessna, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint was to have expired on December 12, 1997, but was extended by 4 days to December 16.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.

G S.M. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to provide 60 - 90 minutes per week of speech/language intervention from the beginning of this school year to present.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.17, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, 300.350, and 300.533 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within the application.

3. One of the assurances made by the District is that, in accordance with the Act, it provide a free appropriate public education to each student with a disability according to the individualized education program ("IEP").

4. S.M. is a student with a disability according to an IEP dated 11/8/96 and another IEP dated 5/23/97. The IEP dated 11/8/96 states that "Speech/Language intervention" service is to be provided to S.M. "60-90 minutes per week". An addendum to that IEP dated 5/23/97 states that "Speech/Language Intervention/Consultation" service is to be provided to S.M. "30 - 60" minutes per week. Ms. T.M. was present at the meeting in which the IEP was amended.

5. The complainant alleges that her son had not received the 60-90 minutes per week of speech therapy required by his IEP since the beginning of the school year.

6. The District, in its response to the complaint, stated that Ms. T.M. had not understood the change in time and type of service delivery (indicated on the 5/23/97 addendum) when S.M. moved from a center based program to the Open School. The speech/language specialist at the Open School indicated she had been serving S.M. since 9/4/97, both directly and through consultation to staff. Other staff members at the school acknowledged her services.

7. Due to Ms. T.M.'s concern, another IEP meeting was held on 11/11/97 to discuss speech/language services. Ms. T.M. was in attendance at that meeting. It was decided to increase the direct/consultation speech/language service to 60-90 minutes per week.

8. On November 21, Ms. T.M. requested that the speech/language therapist consult with an expert in Autism from the J.F.K Center at the University of Colorado Health Sciences Division. The District agreed to honor that request.

9. The complainant was contacted on 12/15/97. She stated that she assumed the 60-90 minutes per week of speech language services were being given, and that the consultation had occurred last week.

III. CONCLUSION

The District did not violate the provisions of the Act by failing to provide 60 - 90 minutes per week of speech/language intervention from the beginning of this school year to present. It did provide those services listed on an IEP addendum dated 5/23/97. In addition the District did agree to increase those service and to provide some consultation requested by the complainant.

IV. REMEDIAL ACTION

None.

Dated this 13th day of December, 1997

Carol Amon
Carol Amon, Federal Complaints Investigator

Case Number: 97. 518

Status: Complaint Decision

Key Topics: IEP

Issues: Goals and Objectives written at meeting or later

Decision: District did hold a second meeting 3-4 weeks later to complete goals and objectives

Discussion: District believed they were accommodating family.

FEDERAL COMPLAINT NUMBER 97.518

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 13, 1997.

B. The complaint was filed by Ms. K.C. on behalf of her son, A.C., against Aurora Public Schools, Dr. David Hartenbach, Superintendent, and Dr. David Wood, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint was to have expired on December 12, 1997, but was extended by 4 days (December 16) due to my inability to make contact with the complainant.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegation contained in the complaint pertaining to a violation of federal law and rules in a federally funded program administered by CDE.

J. A.C. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act, by failing to develop annual goals and short term instructional objectives as part of A.C.'s IEP dated 9/25/97

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401 (a)(16), (17), (18) (19) and (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.344, and 300.346 and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within the application.

3. One of the assurances made by the District is that, in accordance with the Act, it will develop IEPs for all students with disabilities.

4. A.C. is a student with a disability according to an IEP dated 9/25/97.

5. The complainant alleges that on the day A.C.'s IEP was developed, goals and objectives were not developed as part of the IEP process, but rather were developed later and mailed to her. She alleges she was not allowed to give input into the development of these goals and objectives.

6. The law clearly states that written IEPs for each child shall be developed at a meeting in which the parents are invited to participate and that the IEP shall include statements of specific targeted annual goals and short term instructional objectives that measure progress toward the goals with objectie criteria and evaluation procedures and schedules.

7. The District, in its response to the complaint, acknowledged that the goals and objectives section of the IEP was to have been completed within a subsequent few days after the IEP meeting, with each member of the IEP team getting back individually to Ms. K.C. While Ms. K.C. believes this to be a District decision due to time constraints (allegedly, a staff member ended the meeting within an hour); the District believes it was Ms. K.C. who cut the meeting short and, as a result, the team decided to write the goals later.

   The District stated that while it did not encourage this practice as a district and, in fact, insists upon completion of goals at the meeting in concurrence with the Act, the mother agreed to this due to time constraints and the staff present felt they were obliging her.

8. The reason for goals and objectives being written after the IEP meeting is of no significance relative to this matter; the law states clearly they must be developed by the team at the meeting.

9. Subsequently the District held another IEP meeting on October 20, 1997, and acceptable goals were developed.

10. The District, in its response to the complaint, stated that staff now understand that they simply should have requested a continuation of the meeting at a later date as the preferred means to accommodate the family.

III. CONCLUSION

Although the District did technically violate the provisions of the Act by not developing goals and objectives at the 9/25/97 IEP meeting, it did subsequently correct its mistake by holding another IEP meeting on 10/20/97 to develop goals and objectives.

IV. REMEDIAL ACTION

None.

Dated this 15th day of December, 1997

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 519

Status:	Complaint Decision
Key Topics:	IEP
Issues:	Unilateral change in placement with no IEP meeting
Decision:	for parents; district did change placement
Discussion:	District acknowledged its mistakes and initiated follow-up and corrective actions

FEDERAL COMPLAINT NUMBER 97.519

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on October 27, 1997.

B. The complaint was filed by Ms. C.G., an advocate and Mr. M.P., Assistant Executive Director, with the ARC of Adams County, on behalf J.S., son of Mr. J.S. and Ms. D.S., against the Adams County District #1 School District, Dr. Sandra Husk, Superintendent, and Ms. Sharon Wood, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this complaint expired December 26, 1997, but was extended twice to February 28, 1998, to allow for interviews after the holidays and then follow-up which was not anticipated due to error in communication on the part of the complaint's investigator.

D. The process for receipt, investigation and resolution of the complaint is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

H. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receive federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

I. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaint pertaining to violations of federal law and rules in a federally funded program administered by CDE.

J. J.S. is a student with disabilities residing within the District's attendance boundaries and is eligible for special education services from the District;

K. The investigation of the complaint included a review of the documents submitted by the parties; interviews with some of the persons named in those documents or who had information relevant to the complaint; and consideration of relevant case law.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by:

- unilaterally changing placement for J.S. on 9/3/97 without initiating an individualized education program ("IEP") meeting and by

- failing to grant the parents' request for an IEP review on 9/30/97.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

1401(a)(16), (17), (18), (19) and (20) and 1414

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.344, and

the Fiscal Years 1995-97 State Plan Under Part B of the Act 20

C. FINDINGS

1. At all times relevant to the complaint, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within the application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.S. is a student with disabilities as identified on an IEP dated 3/4/97.

5. The complainants allege:

   a. that on 9/3/97, the District added an addendum to J.S.'s 3/4/97 IEP, which significantly changed the services, without reconvening the IEP team and without providing prior written notice to the parents,

      When the parents visited Mr. J., J.S.'s special education teacher, at back-to-school night on 9/3/97, they allege they were given a form to sign which moved J.S. into the special education program full time. This was a change from 7.5 hours of special education and 21.5 hours of regular education to full time special education.

   b. that on 9/30/97, an IEP meeting was convened at the request (dated 9/2/97) of the parents, but the District refused to review or consider changing the IEP at that meeting.

The meeting was facilitated by C.C., a special education coordinator, who stated the purpose of the meeting was to discuss if a review was needed. The parents presented a list of issues and concerns for discussion; it was decided to add a behavior modification plan and health care action plan, other needs were generated and notes were taken; however the IEP was not modified accordingly.

6. The District, in its response to the complaint, states the following relative to the above allegations:

   a. The special education teacher did increase hours of service delivery on 9/3/97 without initiating an IEP meeting.

   b. At the request of the parent, an IEP meeting was scheduled and held on 9/30/97, with 13 people present. Concerns of the private therapist were dialogued, current medication was noted, special education services and time to be spent in regular education were discussed as well as behavior strategies for home and school. Ten items were noted as next steps. A behavior plan was developed with extensive parental input.

7. The District, upon receipt of this complaint, initiated the following follow-up and corrective actions:

   s. The Director of Special Education talked with the special education teacher and building team on 11/4/97 to clarify the responsibilities of the team and to insure that procedural safeguards and due process procedures are followed.

   b. The Director of Special Education contacted the parents and scheduled a review IEP meeting for 11/19/97; and she met with the parents to clarify and better understand their concerns and issues.

8. According to the complainants, the Director of Special Education facilitated the 11/19/97 IEP review. She involved the parents to the point that they indicated this was the first time they felt acknowledged, listened-to, and heard. This was in direct contrast to their feelings relative to the previous IEP meetings during which they felt intimidated to the point of not speaking. Previously, when offering input, the response of the coordinator conducting the meetings was "I don't see why!" and "Tell me what you want and I'll decide whether or not to make those changes." Previously the behavior plan was done in isolation by the special education teacher and the health care plan was done by the nurse with the coordinator refusing to consider them as part of the IEP meeting.

9. During a meeting held with the complainants by the complaints investigator, they acknowledged that J.S.'s current IEP was now considered positive and services were being provided commensurate with that IEP. They stated that although this occurred as a result of the filing of this complaint, they were still concerned about the lack of knowledge of procedures by the special education teacher and coordinator and, most emphatically, about the "attitude" of the coordinator conducting the meetings. They gave numerous examples of statements and behaviors to support their concern.

   The complaints investigator, offered to arrange a meeting with the teacher, coordinator, special education director and, perhaps, the superintendent, to share the complainants' allegations, hear their responses to those allegations and review special education procedures and the concerns relative to "attitude" and their potential effects on parents of students with disabilities, if that was necessary. The complainants felt this would be helpful and agreed this would be an acceptable resolution to this complaint.;

10. Upon contacting the director of special education to arrange such a meeting, she indicated that sharing complaint information, reviewing special education procedures and discussing "attitudinal issues" were part of her job description as director, and she would do so; rather than agreeing to a meeting with the complaints investigator.

III. CONCLUSIONS

By its own admission, the District did violate the provisions of the Act by unilaterally changing placement for J.S. on 9/3/97 without initiating an IEP meeting.

Although an IEP meeting was scheduled and held on 9/30/97, no new IEP appears to have resulted from that meeting.

IV. REMEDIAL ACTION

Upon receipt of this complaint, the District acknowledged its mistakes, and initiated appropriate follow up and corrective actions which led to an appropriate IEP for J.S. Parents have indicated to District personnel and to the advocates/complainants, their satisfaction with the current IEP and with current services. Therefore, no additional remedial action is necessary, relative to J.S.

It is imperative, however, that the actions of the special education teacher and coordinator relative to all students with disabilities, be commensurate with procedures as set forth in the Act. Having been denied the opportunity to talk with those staff members, this complaints investigator is not able to ascertain the validity of the complainants' allegations; but must accept them as valid. Therefore, the following remedial actions are ordered.

On or before April 15, 1998, the director of special education must meet with these staff members (and with any others who may not understand policies and procedures) to clarify policies and procedures relative to the following concepts addressed in the Act:

1. IEPs may be changed only as a result of a properly convened IEP team, and may not be unilaterally changed by a teacher.

2. Decisions by IEP teams are to result from team discussion and consensus, not from a facilitator considering information and then unilaterally deciding whether or not to incorporate that into the IEP.

3. Parents are considered equal participants in IEP meetings and their input must be considered in the same manner as that of others at the meeting.

4. Any reasonable request for an IEP review must be granted.

5. Behavior plans and health care plans are most effective when developed with input from an entire team, including parents, rather than in isolation by one staff member.

6. Better results for children with disabilities occur when the role of parents is strengthened and when a means for parents and school staff to work together in a constructive manner is provided.

On or before April 30, 1998, the District must provide to this office and to the complainants, a written summary of the meetings held with staff members to assure generalized utilization of the above concepts, policies and procedures.

Dated this 26th day of February, 1998

Carol Amon

Carol Amon, Federal Complaints Investigator

Case Number: 97. 520

Status: Complaint Decision

Key Topics: Transportation
Preschool

Issues: failure to provide transportation
missed services due to delayed transportation

Decision: District in violation

Discussion: District initiated system-wide change relative to transportation

FEDERAL COMPLAINT NUMBER 97.520

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on November 21, 1997.

B. The complaint was filed by Mr. and Ms. J.S. on behalf of their daughter, J.S., against the Mesa 51 School District, Dr. George J. Straface, Superintendent, and Mr. Howard B. Littler, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this was to have expired on January 20,1998, but was extended to March 20,1998, for the following reasons: (a) to allow the District, which acknowledged its responsibility relative to this matter, to correct the situation relative to a timeline and process it had put into place, (b) to allow time to determine the effectiveness of proposed changes, as requested by the complainants, and (c) to allow an investigation as to whether this issue was dealt with from a system-wide perspective since one other complaint had been filed on the same issue.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaints pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G. J.S. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to provide transportation from preschool to day care, three days per week, as indicated on the IEP, and (as a result) failed to provide services to J.S. during the first 15 to 20 minutes of preschool each day, due to delayed bus transportation.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (19), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J. S. is a five year old girl with Down Syndrome whose IEP indicates transportation will be provided to and from preschool.

5. The complainants allege that J.S. attends preschool three afternoons a week with her classes ending at 3:00, but that (even though the day care site is only 1 and 1/2 miles from the preschool), J.S. remains on the bus in transit for nearly 2 hours each afternoon. This has resulted in her 4:30 private speech and physical therapy appointments being in jeopardy. In addition, the complainants allege that as a result of the long morning bus ride, J.S. is 15 to 20 minutes late for preschool programming. They allege that the bus transit time should not exceed 45 minutes each way.

6. The District recognized its responsibility relative to this matter and responded to the complaint, stating it was working with the complainants in an effort to devise a more expeditious plan of transportation for J.S. and that the plan would be designed to ensure that she is not on the bus for a period longer than 45 minutes and that she would not miss any class time due to the bus schedule. The target date for implementing new and shortened bus schedules was January 7, 1998.

7. This complaints investigator met with the complainants on the evening of January 20, 1998. The complainants indicated they were very pleased with the new bus schedule, and that J.S. was now on the bus for only 20 - 30 minutes each way. Because the schedule was new, they asked that the complaint be extended to allow time for monitoring, to assure this schedule remained in place. They also suggested that other parents of preschool children may be experiencing the same issues; and it would be helpful to make sure this was a "system solution", not just a solution for their child.

8. A telephone message from the complainants on March 17, 1998, stated they are extremely happy with the transportation schedule and with the resolution of this complaint.

9. R.H., the preschool coordinator for the District, assured this complaints investigator that, although they are providing transportation services to approximately 260 preschool students with disabilities, they are aware of no concerns at this point in time relative to the transportation issue.

III. CONCLUSIONS

The District did violate the provisions of the Act, by its own omission, by failing to provide transportation from preschool to day care, three days per week, as indicated on the IEP of J.S., and failed to provide services to J.S. during the first 15 to 20 minutes of preschool each day, due to delayed bus transportation. The District did immediately, upon learning of this complaint, set forth a process for correction of this issue, not only relative to this preschool child, but system-wide. The complainants are pleased with the resolution to this complaint. No further action is deemed necessary.

Dated this 20th day of March, 1998

Carol Amon, Federal Complaints Investigator

Case Number: 97. 521

Status:	Complaint Decision
Key Topics:	Transportation Preschool
Issues:	failure to provide transportation missed services due to delayed transportation
Decision:	District in violation
Discussion:	District initiated system-wide change relative to transportation

FEDERAL COMPLAINT NUMBER 97.521

FINDINGS AND RECOMMENDATIONS

I. PRELIMINARY MATTERS

A. A complaint was received by the Federal Complaints Coordinator, Colorado Department of Education ("CDE"), on November 26, 1997.

B. The complaint was filed by Ms. C.C. on behalf of her son, J.C., against the Mesa 51 School District, Dr. George J. Straface, Superintendent, and Mr. Howard B. Littler, Director of Special Education ("the District").

C. The timeline within which to investigate and resolve this was to have expired on January 26,1998, but was extended to March 26,1998, for the following reasons: (a) to allow the District, which acknowledged its responsibility relative to this matter, to correct the situation relative to a timeline and process it had put into place, (b) to allow time to determine the effectiveness of proposed changes, as requested by the complainants, and (c) to allow an investigation as to whether this issue was dealt with from a system-wide perspective since one other complaint had been filed on the same issue.

D. The process for receipt, investigation and resolution of the complaints is established pursuant to the authority of the Individuals With Disabilities Education Act 20 U.S.C. 1401 et. seq., ("the Act"), and its implementing regulations concerning state level complaint procedures, 34 C.F.R. 300.660-300.662, and Colorado State Board of Education Policy No. 1280.0.

E. The complaint was brought against the District as a recipient of federal funds under the Act. It is undisputed that the District is a program participant and receives federal funds for the purpose of providing a free appropriate public education ("FAPE") to eligible students with disabilities under the Act.

F. The complaint was accepted for investigation based upon a determination that CDE had jurisdiction over the allegations contained in the complaints pertaining to violations of federal law and rules in a federally funded program administered by CDE.

G J.C. is a student with disabilities eligible for services from the District under the Act.

H. The investigation of the complaint included a review of the documents submitted by the parties; interviews with persons named in those documents or who had information relevant to the complaints; and consideration of relevant case law and federal agency opinion letters.

I. ISSUE

A. STATEMENT OF THE ISSUE:

Whether or not the District has violated the provisions of the Act by failing to provide transportation from preschool to home, two days per week, as indicated on the IEP, and failed to provide services to J.C. during the first 15 to 20 minutes of preschool each day, due to delayed bus transportation.

B. RELEVANT STATUTORY AND REGULATORY CITATIONS

20 U.S.C. 1401(a)(16), (17), (18), (19), (20), and 1414,

34 C.F.R. 300.2, 300.7, 300.8, 300.11, 300.14, 300.16, 300.121, 300.130, 300.180, 300.235, 300.300, 300.340, 300.346, and

Fiscal Years 1995-97 State Plan Under Part B of the Act

C. FINDINGS

1. At all times relevant to the complaints, the District was receiving funds under the Act pursuant to an approved application for funding.

2. The funds were paid to the District, in part, based on the assurances contained within its application.

3. One of the assurances made by the District is that in accordance with the Act, it will provide a FAPE, including special education and related services, to each eligible student with disabilities within its jurisdiction to meet the unique needs of that child.

4. J.C.'s IEP indicates transportation will be provided to and from preschool.

5. The complainants allege that J.C. attends preschool two afternoons a week with his classes ending at 3:30, but that he remains on the bus in transit for nearly 2 hours each afternoon. In addition, his long bus ride to school each morning results in his missing the first 15-20 minutes of preschool instruction.

6. The District recognized its responsibility relative to this matter and responded to the complaint, stating it was working with the complainant in an effort to devise a more expeditious plan of transportation for J.C. and that the plan would be designed to ensure that he is not on the bus for an unreasonable length of time and that he would not miss any class time due to the bus schedule. The target date for implementing new and shortened bus schedules was January 7, 1998.

7. This complaints investigator spoke with the complainant in January, at which time she indicated she was very pleased with the new bus schedule, but there had been some problems in the implementation of the new schedule. Because the schedule was new, she agreed to extend the timeline for resolution of this complaint to allow for monitoring to assure this schedule remained.

8. A telephone message from the complainant in March, stated she was happy with the transportation schedule and with the resolution of this complaint, although an occasional problem in communication with the transportation department still occurs.

III. CONCLUSIONS

The District did violate the provisions of the Act, by its own omission, by failing to provide transportation from preschool to home, two days per week, as indicated on the IEP of J.C., and failed to provide services to J.C. during the first 15 to 20 minutes of preschool each day, due to delayed bus transportation. The District did immediately, upon learning of this complaint, set forth a process for correction of this issue, not only relative to this preschool child, but system-wide. The complainant has accepted the resolution to this complaint. No further action is deemed necessary at this time.

Dated this 20th day of March, 1998

Carol Amon

Carol Amon, Federal Complaints Investigator